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Supreme Court, U.S.
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No. 87-

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES F. MONAHAN, RICHARD DUDLEY, JEFFREY ROSS, CHESTER BABINEAU, EILEEN DUMOUCHEL, ANTHONY LAMONICA, MORRIS LEDERMAN, JOHN STALLWORTH, and ROMULUS DENICOLA,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether a state agency is immune to antitrust scrutiny of its duly promulgated regulations under the state action doctrine, and therefore to compulsory examination of its officials under oath regarding the "justifications" for, and "reasonableness" of, their regulatory activities.

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IN THE
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CHARLES F. MONAHAN, RICHARD DUDLEY, JEFFREY ROSS, CHESTER BABINEAU, EILEEN DUMOUCHEL, ANTHONY LAMONICA, MORRIS LEDERMAN, JOHN STALLWORTH, and ROMULUS DENICOLA,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners Charles F. Monahan, Richard Dudley, Jeffrey Ross, Chester Babineau, Eileen Dumouchel, Anthony Lamonica, Morris Lederman, John Stallworth, and Romulus DeNicola hereby petition this Court for a writ of certiorari

to review a judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the District Court is unpublished, and is reproduced in the Appendix to the Petition (Pet. App.) at A18. The opinion of the Court of Appeals is also unpublished, and is reproduced in the Appendix at A1. Prior to the commencement of this action, the Federal Trade Commission and a single commissioner of the Commission each issued a decision. Those decisions are reproduced in the Appendix at A37 and A27, respectively.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on November 4, 1987. Pet. App. A39. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this matter are the Federal Trade Commission (FTC) Act, 15 U.S.C. §§ 41 et seq.; the federal antitrust laws, 15 U.S.C. §§ 1-7, 12-27, as they are enforced by the Federal Trade Commission; and Massachusetts General Laws, chapter 13, §§ 22-25, chapter 94C, §§ 1-14, and chapter 112, §§ 27-42A, 61-64. Pertinent portions of these statutes are reproduced in the Appendix. Pet. App. at A100-45. This action also involves certain regulations promulgated pursuant to state law by the Massachusetts Board of Registration in Pharmacy. The regulations are codified pursuant to the state Administrative Procedure Act in

the Code of Massachusetts Regulations, title 247, §§ 7.00(7), 7.00(14), 7.00(26), and amendments thereto. The regulations are reproduced as an appendix to the decision of the Court of Appeals. Pet. App. A12-17.

STATEMENT OF THE CASE

1. The petitioners are employees or members of the Massachusetts Board of Registration in Pharmacy. The Board is an agency of the Commonwealth of Massachusetts in the Division of Registration within the Executive Office of Consumer Affairs and Business Regulation (a cabinet-level office within the Executive Branch of the Government of the Commonwealth). The Board consists of seven persons appointed by the Governor of the Commonwealth for five-year terms. Mass.

Gen. Laws ch. 13, § 22 (1986 ed.).[1/]

The Board was created by the Massachusetts Legislature in 1885, and is mandated by law to license and regulate persons engaged in the business and profession of pharmacy.[2/] Pursuant to chapter 112, § 42A, of the General Laws, the Board is authorized to "make such rules

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1/ Section 22 stipulates that five of the members must be engaged in the drug business, of which one must be employed in "a retail drug organization operating ten or more registered retail drug stores." Of the two remaining members, one must be employed as a hospital pharmacist, and one must be a lay member.

2/ Mass. Stat. 1885, c. 313. See Mass. Gen. Laws ch. 112, §§ 24, 37 (examination and registration of pharmacists and retail drug stores); id. §§ 40, 42A, 61 (revocation and suspension of licenses); Mass. Gen. Laws ch. 94C, § 7 (registration of pharmacies and wholesale druggists to deal with controlled substances); id. §§ 13, 14 (revocation and suspension of controlled substances registrations).

and regulations as it deems necessary to enable it to properly enforce the provisions of law relating to the retail drug business and pharmacy, and regarding any other matter within its jurisdiction," and to "adopt, amend or repeal rules of professional conduct." Pursuant to chapter 94C, § 6, of the General Laws, the Board is empowered to "promulgate rules and regulations relative to registration and control of the manufacture, distribution, dispensing, and possession of controlled substances within the commonwealth." The Board may suspend, revoke, or cancel the licenses of persons who violate the laws and regulations pertaining to pharmacy. Mass. Gen. Laws ch. 112, §§ 27-29, 40, 42A, 61; Mass. Gen. Laws ch. 94C, §§ 13, 14.

The Board has promulgated comprehensive regulations governing retail pharmacies and the qualifications and conduct of pharmacists. One component of these regulations is a Code of Professional Conduct, which the Board adopted pursuant to Mass. Gen. Laws ch. 112, § 42A. Among the provisions of the Code in effect in 1985 were three rules (Rules 7, 14, and 26) which, respectively, proscribed claims of professional superiority and disparagement of other pharmacists, prohibited mail order pharmacy, and prohibited the collection and delivery of prescriptions in batches by unlicensed pharmacists. Pet. App. A12-17.

2. In 1985, the Federal Trade Commission commenced a series of "law enforcement investigations" into the regu-

latory activities of professional licensing boards in Massachusetts and other states, avowedly to determine whether the state boards were engaging in "unfair methods of competition" by promulgating and enforcing regulations to restrain competition. Pet. App. A44-45, A63-64.

In August, 1985, the Commission wrote to the Pharmacy Board that it had reviewed the Pharmacy Board's regulations and had identified Rules 7, 14, and 26 of the Code as rules which the Commission thought might "unreasonably restrain competition and injure consumers."[3/] The

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3/ The Commission had already commenced an investigation of the Massachusetts Board of Registration in Optometry. In July, 1985, the Commission issued a complaint against that Board, charging its members had combined or conspired to re-

(footnote continued)

Commission asked the Board to produce documents concerning the promulgation and enforcement of the regulations, and requested that its investigators be permitted to question the Board's members and its present and former executive secretaries. Pet. App. A52. The Board provided the requested documents but declined to permit Commission investigators to meet with its employees or members. Pet. App. A45, A81.

(footnote continued)

strain competition by promulgating regulations to govern advertising by optometrists. That complaint was tried before an administrative law judge and resulted, in June, 1986, in a recommendation to the Commission that the Optometry Board members be ordered to cease and desist from enforcing certain regulations. The Optometry Board's appeal of that recommendation has been awaiting decision by the Commission since December, 1986. Pet. App. A90.

In May, 1986, the Commission's investigators served deposition subpoenas upon the petitioners.[4/] The petitioners petitioned the Commission to quash the subpoenas or, alternatively, to stay its use of compulsory process pending a final decision in the proceeding against the Optometry Board. A single commissioner ruled that the Board had not established its immunity and denied the petition. Pet. App. A27, A31-32. The full Commission agreed, and denied the Board's request for review. Pet. App. A37-38.

3. The petitioners declined to comply with the subpoenas, and, in October, 1986, the Commission commenced this

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4/ The use of compulsory process was authorized by the Commission in a general resolution in November, 1985. Pet. App. A63.

action for enforcement.[5] On April 15, 1987, the District Court issued its Memorandum and Order allowing the petition. Pet. App. A18. On November 4, 1987, the Court of Appeals affirmed.[6] Pet. App. A39. On December 10, the Court of Appeals stayed its mandate pending this petition. Fed. R. App. P. Rule 41(b).

5/ The District Court's jurisdiction over the petition for enforcement was founded upon 15 U.S.C. § 49 (1982).

6/ The District Court's order was final and appealable under 28 U.S.C. § 1291. See Cobbledick v. United States, 309 U.S. 323, 330 (1940); O'Connor v. O'Connell, 253 F.2d 365, 365-67 (1st Cir. 1958). See Point IV, infra.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. THE FTC'S CLAIM OF AUTHORITY TO CONDUCT A "LAW ENFORCEMENT" INVESTIGATION OF A STATE REGULATORY AGENCY, AND TO EXAMINE ITS OFFICIALS UNDER OATH REGARDING THEIR REGULATORY ACTIVITIES, RAISES AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE REVIEWED BY THIS COURT.

A. The FTC's Investigation and Examination of State Officials Regarding Their Official Activities Seriously and Inappropriately Interferes With State Regulatory Programs.

The FTC has subpoenaed the members of "an agency created and operating under . . . the General Laws of . . . Massachusetts,"[7/] to give depositions under oath regarding "the procedures of the Board; the origin and history of the Regulations, including the reasons for

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7/ Pet. App. A43.

enacting, amending, and retaining the Regulations; the interpretation of the Regulations and their history of enforcement; the effect of the Regulations on competition in the sale of prescription drugs; and the role of pharmacists and related professional and trade associations in the enactment, amendment, enforcement, and interpretation of the Regulations." Pet. App. A61.

These depositions are to be taken as part of a "law enforcement investigation," the purpose of which is to determine if, by enacting the regulations, the Board "ha[s] engaged or [is] engaging in unfair methods of competition . . . by placing unreasonable restrictions on advertising or on business practices . . . ." Pet. App. A40-41, A63. The Commission asserts that the depositions of

the petitioners are necessary to determine "the justifications, if any, that may exist to support the regulations" and to obtain information about "the interpretation and enforcement of the regulations," so that the Commission may decide "whether issuance of a complaint would be in the public interest." Pet. App. A66-67.

The Court of Appeals held that the State must comply with the Commission's subpoenas because the Board's immunity under the antitrust laws depends upon whether the Board's regulatory activities are justified by "legitimate regulatory purposes," and on whether the Board's activities are "'essentially' those of private parties." Pet. App. A7-8.

The Commission's attempt to review the justifications for and reasonableness

of the Board's regulatory program, and in connection therewith to probe the involvement and intent of Board members in developing, promulgating, and enforcing regulations, directly invades state governmental functions.

First, the investigation is directed against regulations which carry the full force of statutes adopted by the Massachusetts Legislature. Pet. App. A72-74. See Levy v. Board of Registration and Discipline in Medicine, 378 Mass. 519, 524, 392 N.E. 2d 1036, 1040 (1979). Both the Commission's petition for judicial enforcement of its subpoenas and the decision below dispute respondents' claim of immunity by reference to a perceived need to determine the justifications for the regulations. Affidavit of Commission

Attorney Sacks, Pet. App. A65-67; Federal Trade Commission v. Monahan, Pet. App. A5-6. But inquiry into the mental processes of governmental policymakers and the justifications for regulatory actions has long been foreclosed as destructive of the lawmaking process. See National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975) (the "ultimate purpose of this long recognized privilege is to prevent injury to the quality of agency decisions."); United States v. Morgan, 313 U.S. 409, 422 (1941).

Second, the Commission's assertion of jurisdiction is premised upon its characterization of the Board as a "subordinate governmental unit." Pet. App. A5. Under the Commission's theory, its investigation is authorized because

Massachusetts has forfeited antitrust immunity by choosing to regulate the business and profession of pharmacy through regulations promulgated by the Board rather than by statutes enacted by the Legislature. However, the establishment of the Board and the delegation to it of legislative powers reflect the considered decision of the Massachusetts Legislature of how best to structure the government of the Commonwealth. See Milliken v. Bradley, 418 U.S. 717, 741 (1974) (rejecting "the notion that school district lines may be casually ignored or treated as a mere administrative convenience"); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 40 (1973) ("We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse

state and local tax revenues."). The Commission's position penalizes this legislative choice.

This misguided effort to characterize the Massachusetts Pharmacy Board as a "subordinate" governmental unit also threatens to obscure the fundamental distinction in "state action" analysis between units of local government on the one hand and state government on the other. The plain and uncontroverted fact is that the Massachusetts Pharmacy Board is a state, not a local agency, and that the regulations in question were promulgated pursuant to express, legislatively delegated authority.

The mere pendency of a "law enforcement investigation" by the Commission, entailing burdensome compulsory proceedings and possible liability under the

antitrust laws,[8/] is likely to inhibit state officials from exercising their best judgment in controversial matters out of concern that their actions will be viewed inhospitably under the Commission's microscope. Cf. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 814-18 (1982). Thus, the Commission's investigation could substantially "nullify [the] state's control over its officers and agents." See Parker v. Brown, 317 U.S. 341, 350-351 (1943). Cf. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 68 (1963) (enjoining notices by state commission to publishers of books claimed to be unsuitable for minors: "[p]eople do not

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8/ See Affidavit of Thomas A. Barnico, Pet. App. A90, describing proceedings in the Massachusetts Optometry Board case.

lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around"). The Commission is using its investigatory power against professional licensing boards in other States with just such an effect.9/

9/ Since 1984, the Commission has investigated the regulatory agencies of at least 19 states. See, e.g., In re Arizona Board of Pharmacy, FTC File No. 841-0046; In re Arkansas State Board of Dental Examiners, FTC File No. 851-0175; In re Colorado Board of Pharmacy, FTC File No. 841-0045; In re Connecticut State Board of Landscape Architects, FTC File No. 851-0022; In re Georgia Board of Pharmacy, FTC File No. 851-0012; In re Idaho State Board of Optometry, FTC File No. 851-0069; In re Idaho Board of Pharmacy, FTC No. 841-0045; In re Iowa State Board of Dental Examiners, FTC File No. 842-3204; In re Massachusetts Board of Registration in Medicine, FTC File No. 851-0011; In re Michigan Board of Pharmacy, FTC File No. 851-0089; In re Montana Board of Realty Regulation, FTC File No. 861-0054; In re New York Board of Pharmacy, FTC File No. 841-0070; In

(footnote continued)

B. The FTC's Authority to Conduct "Law Enforcement Investigations" of State Regulatory Agencies Is a Question Which Has Not Been Decided By This Court.

The Court of Appeals rejected the Board's claims that as a state regu-

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(footnote continued)

re Oregon State Board of Clinical Social Workers, FTC File No. 861-0058; In re Oregon State Board of Tax Service Examiners, FTC File No. 861-0039; In re Rhode Island Board of Pharmacy, FTC File No. 841-0125; In re Washington State Board of Funeral Directors and Embalmers, FTC File No. 851-0077; In re Wisconsin Medical Examining Board, FTC File No. 841-0211. At least three states have formally resisted compulsory process, initially at least without success. North Carolina Board of Registration for Professional Engineers and Land Surveyors v. FTC, 615 F. Supp. 1155 (E.D. N.C. 1985); In re Colorado Board of Pharmacy, FTC File No. 841-0126. In some cases, the Commission has issued complaints and entered consent orders. See, e.g., In re Rhode Island Board of Accountancy, FTC Docket No. 9181, 50 Fed. Reg. 49064 (November 29, 1985); In re Wyoming State Board of Registration of Chiropractors,

(footnote continued)

latory agency it is either ipso facto immune to scrutiny under the antitrust laws, or immune by virtue of the Massachusetts Legislature's delegation to it of authority to regulate the business and profession of pharmacy. The court reasoned that the Board is a "subordinate governmental unit" and for that reason "enjoys antitrust 'immunity' only when it acts pursuant to a 'clearly articulated and affirmatively expressed' state policy." Pet. App. A5, citing Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), and Hoover v. Ronwin, 466

(footnote continued)

FTC File No. 861-0019, FTC Docket No. C-3176, 51 Fed. Reg. 6106 (February 20, 1986); In re Montana Board of Optometrists, FTC Docket No. C-3161, 50 Fed. Reg. 24203 (June 10, 1985); In re Louisiana State Board of Dentistry, FTC Docket No. 9188. Only one case has reached a trial before an administrative law judge. In re Massachusetts Board of Registration in Optometry, FTC Docket No. D-9195.

U.S. 558 (1984). Ignoring the Board's express statutory authority to regulate the business and profession of pharmacy, the court ruled that whether the Board is immune in relation to particular regulatory action turns on its purpose in undertaking the action. In order to determine the Board's purpose, the court said, the Commission was authorized to depose the Board members to probe their involvement and their actual intent in developing, promulgating, and enforcing the regulations. Pet. App. A6-8. Thus, because (and only because)[10/] it be-

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10/ The Commission has contended that state action immunity is not the sort of claim that can be raised in a subpoena enforcement proceeding, regardless of whether it involves factual issues. The Court of Appeals ruled on the merits of the petitioners' theory, however. See Pet. App. A4 ("The Board seems to take

(footnote continued)

lieved that there were factual questions to be answered, the Court concluded that the Board's claim that its regulations are immune from scrutiny under the antitrust laws could not be determined in a subpoena enforcement proceeding. Pet. App. A11.

The existence and scope of immunity from scrutiny under the antitrust laws are questions of legislative intent. Parker v. Brown, 317 U.S. 341 (1943). The decision of the Court of Appeals thus imputes to Congress the intent to authorize a federal agency to investigate and determine whether the actions of a state

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(footnote continued)

the view that this immunity protects its original regulations from investigation no matter how harmful to competition or to consumers they may turn out to be. This, however, is not so."). See also Argument III, infra.

regulatory agency are unreasonable or unlawful under state law, or are the product of self-interest on the part of state regulators.[11/]

In Parker v. Brown, 317 U.S. 341, 350-51 (1943), however, this Court held that the Sherman Act does not prohibit the imposition of restraints upon trade or commerce by a state acting in its sovereign or governmental capacity. The decision can and should be read to establish an immunity from antitrust scrutiny for state agencies exercising regulatory authority.[12/] However, the decision

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11/ The Court of Appeals in fact ruled that "[t]he state statutes do not permit the Board, under the guise of regulation, and without legitimate purpose, simply to raise consumer prices or to inconvenience workers by making them travel farther for prescriptions." Pet. App. A6.

12/ In Parker, this Court emphasized that, although many terms of a marketing

(footnote continued)

in Goldfarb v. Virginia State Bar, 421 U.S. 773, 791-92 (1975), has caused some confusion in the lower courts on this score. In Goldfarb, this Court ruled that the State Bar Association of Virginia, a private organization which was "a state agency for some limited purposes," was not immune to antitrust scrutiny with respect to its effort to enforce minimum fee schedules for attorneys' services. And in City of Lafayette

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(footnote continued)

program for raisins under the California Probate Act were fixed by the producers, the program was authorized by state law and enforced by a state commission. 317 U.S. at 351-52. The program was immune because "it [was] the state, acting through the Commission, which adopt[ed] the program and which enforce[d] it with penal sanctions, in the execution of a governmental policy." Id. at 352.

v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978), a plurality of the Court said that "Goldfarb . . . made it clear that, for purposes of the Parker doctrine, not every act of a state agency is that of the State as sovereign." See also Hoover v. Ronwin, 466 U.S. 558, 568-69 (1984) (referring in dicta to agencies other than the legislature or supreme court as "nonsovereign state representative[s]" which are immune only if acting pursuant to a "clearly articulated and affirmatively expressed state policy"). While the Court has never held that a state regulatory agency, exercising its regulatory powers, is subject to scrutiny under the antitrust laws, these decisions appear to leave the nature and scope of a state regulatory agency's im-

munity an open question.[13/]

13/ The plurality opinion in Lafayette appears to have understood Goldfarb to sanction antitrust scrutiny of state regulatory agencies. See 435 U.S. at 411-12 & nn. 40-41. But see id. at 412-13 & n. 42 ("municipalities are 'exempt' from antitrust enforcement when acting as state agencies implementing state policy to the same extent as the State itself . . ."). However, the state bar in Goldfarb was an adjunct agency of the state supreme court, not a regulatory agency in the executive branch of the state government, and the activities under scrutiny were plainly not supported by the state supreme court.

In Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985), California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), and New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96 (1978), the Court addressed claims that private anticompetitive conduct was immunized by state action from antitrust scrutiny. Each case was decided upon the basis of whether the conduct was encouraged or mandated, and actively supervised, by the state. In Midcal Aluminum, a negative answer to these questions resulted in the invalidation of the statute as being in conflict with the antitrust laws. See also 324 Liquor Corp. v. Duffy, 107 S. Ct. 720 (1987). None of these cases held that a state agency must demonstrate specific legislative support of its regulatory activities.

For all of these reasons, the nature and scope of state regulatory agencies' immunity to scrutiny under the antitrust laws, and in particular to investigation by the Commission, is a question which ought to be settled by this Court.

II. THERE IS A SEVERE CONFLICT AMONG THE CIRCUITS AS TO THE NATURE AND SCOPE OF STATE AGENCIES' IMMUNITY FROM ANTITRUST SCRUTINY OF THEIR REGULATORY ACTIVITIES.

The decision of the court below, holding that a state agency's immunity from antitrust scrutiny of its regulatory activities depends upon whether those activities have a "legitimate regulatory purpose," Pet. App. A7-8, conflicts with decisions of the Ninth, Fifth, and Second Circuits.

In at least two cases, the Ninth Circuit has held that agencies within the

executive branch of state government, acting within the scope of their authority, act as the sovereign. See Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., 810 F.2d 869, 875 (9th Cir. 1987) ("We see no reason why a state executive branch, when operating within its constitutional and statutory authority, should be deemed any less sovereign than a state legislature, or less entitled to deference under principles of federalism"), quoting Deak-Perera Hawaii, Inc. v. Department of Transportation, 745 F.2d 1281, 1282-83 (9th Cir. 1984), cert. denied, 105 S. Ct. 1756 (1985). Similarly, in Limeco, Inc. v. Division of Lime of the Mississippi Department of Agriculture & Commerce, 778 F.2d 1086, 1987 (5th Cir. 1985), the Fifth Circuit held that a state operated enterprise is

ipso facto immune to antitrust attack. The First Circuit, in the decision below, and the Second Circuit disagree with this view. Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc., 790 F.2d 1032, 1042-43, 1044 (2d Cir. 1986) (state agency must "identify a 'clearly expressed state policy' that authorizes its actions"). See generally Gambrel v. Kentucky Board of Dentistry, 689 F.2d 612, 619 n. 3 (6th Cir. 1982) (whether a policy initiated by a state agency acting under general authority can constitute state action is open question).

Of those courts holding that state agencies must demonstrate legislative support for their regulatory initiatives, the Second Circuit and the Ninth Circuit have held that it is sufficient if the

regulation is in an area delegated by law to the agency, and if, as put by the Second Circuit, "the enabling statute . . . create[s] grounds for a reasoned belief that some anticompetitive activity could be envisioned." Cine 42nd Street Threater Corp. v. Nederlander Org., 790 F.2d at 1043-44. See Patrick v. Burget, 800 F.2d 1498, 1507 (9th Cir. 1986), cert. granted, 108 S. Ct. 65 (1987) (agency's action is immune if it is within the scope of, and contemplated by, the agency's statute, regardless of whether it was taken in good or bad faith). See also P. Areeda & H. Hovencamp, Antitrust Law ¶ 212.3, at 104 (Supp. 1986).

The decision below conflicts with the decisions of the Ninth and Fifth Circuits in its holding that state regulatory agencies acting intra vires do not

ipso facto express sovereign state policy, and so are not ipso facto immune. The decision conflicts with decisions of the Ninth and Second Circuits in that it holds that, to demonstrate clear and affirmative legislative support for its policies, a regulatory agency must demonstrate (here, to the satisfaction of a specialized federal agency) that its policies serve a legitimate regulatory purpose, are reasonable, and do not represent essentially private activities.

Because the question seriously affects the federal-state balance in the area of business regulation, and because it has caused confusion and conflict among the circuits, this Court should grant the petition. Pet. App. A6-8 and should review the Board's claim that its duly promulgated regulations are immune

under the state action doctrine from antitrust scrutiny.

III. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH DECISIONS OF THIS COURT IN CONSTRUING THE ANTITRUST LAWS TO AUTHORIZE THE FTC TO EXAMINE STATE REGULATORS UNDER OATH CONCERNING THE JUSTIFICATIONS FOR, AND REASONABLENESS OF, THEIR REGULTORY ACTIVITIES.

In rejecting the Board's argument that state regulatory agencies are ipso facto immune to investigation or prosecution under the antitrust laws in connection with their regulatory actions, the Court of Appeals decision conflicts (albeit indirectly) with decisions of this Court, including its antitrust decisions.

Parker v. Brown, 317 U.S. 341 (1943), held that the Sherman Act does not encompass state governmental action, even if

it is grossly anticompetitive. The Court drew this conclusion from the lack of evidence in the statute and legislative history that Congress intended to limit the regulatory activities of the states:

> In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Id. at 351. See also Younger v. Harris, 401 U.S. 37, 44-45 (1971). This rule of statutory construction is settled, and has been applied many times by the Court. See, e.g., Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242-43 (1985) (construing § 504 of Rehabilitation Act as not abrogating Eleventh Amendment immunity, there being no clear indication

of congressional intent to the contrary); Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 17 (1981) (holding for lack of contrary evidence that Developmentally Disabled Assistance and Bill of Rights Act did not create substantive rights enforceable against states); United States v. Bass, 404 U.S. 336, 349 (1971) (federal criminal statute should be construed to avoid the conclusion that state law was preempted, in absence of evidence that Congress had meant to preempt). See also L. Tribe, American Constitutional Law § 5-8 at 243 (1978).

The assumption that Congress would not casually nullify state governmental activities was given the force of a positive constitutional fact in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 554 (1985). Follow-

ing Garcia, the "clear statement" rule must act both as a rule of statutory construction and as a substitute for judicial review of claims that Congress has unconstitutionally infringed state sovereignty.

Starting from the premise established by these decisions, it is not possible to arrive at the conclusion reached below. In Parker, this Court observed that there is "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350-51. See also Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 56 n. 19 (1985). It is equally true that there is nothing in the language or history of the Sherman Act to suggest that Congress

intended to restrain state agencies in their law making as distinguished from their law interpreting or enforcing activities, or to make the lawfulness of state agency action under state law a proper subject for scrutiny under the antitrust laws.[14/] Obviously, the state must act through agents. Consequently, the state's immunity to anti-

---

14/ The Commission did not assert jurisdiction to investigate the lawfulness and purpose of state regulatory action until the mid-1970's. See State of California ex rel. Christensen v. Federal Trade Commission, 549 F.2d 1321, 1322 (9th Cir.), cert. denied, 423 U.S. 876 (1977). Before the Court of Appeals, the Commission tied its current position to the amendment of its Act in 1974 to extend its jurisdiction to activities "affecting" interstate commerce. One may search the amendments and their legislative history in vain for any mention of a purpose to extend the Commission's jurisdiction to state agencies, or to authorize the Commission to inquire into the reasonableness, "legitimacy", or lawfulness of state regulatory action under state law.

trust scrutiny is only meaningful to the extent that its agents acting in their official capacities share that immunity. The Court of Appeals decision posits that a state's agents are immune if, but only if, they act in accordance with clear and explicit statutory authorization. As this Court said of this theory, when it was put forward as a limitation on Eleventh Amendment immunity, "[t]he theory is out of touch with reality . . . [and] would make the law a pretense." Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 107 (1984). Certainly if "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress," Parker v. Brown, supra, then a purpose to effectively

"emasculate"[15/] the state action immunity reserved by Congress also should not be read into the statute without clear statutory support. Cf. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 44 n. 7 (1985). (close examination of state legislature's intent "would undercut the fundamental policy of Parker and the state action doctrine of immunizing state action from federal antitrust scrutiny").

Furthermore, if it is assumed that Congress intended to leave state regulatory power untrammeled by the antitrust laws, then it follows under other principles of statutory construction that Congress intended also to leave state agencies (or at least regulatory agencies in the executive branch) unregulated.

15/ See Pennhurst, 465 U.S. at 106.

This is so because a state agency acting intra vires is considered to be acting as the state, see Pennhurst, supra at 100-01 & n. 11,[16/] and therefore was presumably so considered by Congress when it enacted the antitrust laws. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 382 & n. 66 (1982) (statutes are presumed to be consistent with existing legal principles absent evidence to the contrary).

This view of congressional intent finds support in this Court's decisions. In Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), the Court held that the actions of municipalities are not as such immune to antitrust scrutiny.

16/ See also Alabama v. Pugh, 438 U.S. 781 (1978); Kennecott Copper Corp. v. State Tax Commission, 327 U.S. 573 (1946).

The plurality opinion emphasized that municipalities "are not themselves sovereign." Id. at 412 & n.42, citing, inter alia, Edelman v. Jordan, 415 U.S. 651, 667 n. 12 (1974); Lincoln County v. Luning, 133 U.S. 529 (1890). In Community Communications Co. v. Boulder, 455 U.S. 40 (1982), a majority of the Court adopted this point as the rationale for its holding that action by the city was not ipso facto immune to antitrust scrutiny. See id. at 53 ("Ours is a 'dual system of government,' Parker, 317 U.S., at 351 . . ., which has no place for sovereign cities") (emphasis in the original); id. at 54 ("Thus Parker recognized Congress' intention to limit the state-action exemption based upon the federalism principle of limited state sovereignty"). Under the Eleventh Amendment prin-

ciples relied upon in Lafayette and Boulder, state agencies, unlike municipalities, are regarded as equivalents of the state as sovereign, and therefore immune. See, e.g., Pennhurst, 465 U.S. at 100.[17/]

The court of appeals also held that the Board must show that it is engaging in its regulatory activities pursuant to a clearly expressed state policy, and

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17/ Lafayette also states that "for purposes of the Parker doctrine, not every act of a state agency is that of the State as sovereign," 435 U.S. at 410, citing Goldfarb v. Virginia State Bar, 421 U.S. 772 (1975). But that point was directed to ultra vires activities. See 435 U.S. at 409-10. This Court has cautioned against using the antitrust laws to nullify otherwise constitutional delegations of power by state legislatures. See Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48, 64-65 (1985) ("Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness").

that it may not rest upon a state policy, expressed in the statutes, giving the Board power to license, regulate, and discipline persons engaged in the business and profession of pharmacy. Indeed, the court of appeals went so far as to hold that the Board must bear the burden in each case of demonstrating that the questioned regulations were adopted and are enforced, both ostensibly and in fact, for "legitimate regulatory purposes." Pet. App. A6-7.[18/]

18/ The court also stated that, depending upon the role played by the Board members who are private pharmacists -- by statute, six out of the seven members -- the Board might be regarded functionally as a private body, and therefore be required to demonstrate "active state supervision." Pet. App. A8. Although the Court left the question of active supervision of state agencies open in Town of Hallie v. City of Eau Claire, 471 U.S. at 46 & n. 10, it held that municipalities were presumed to act in

(footnote continued)

The court's decision conflicts with this Court's decisions in Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985), and Southern Motor Carriers Rate Conference, Inc. v. United States, 466 U.S. 558 (1984).[19/]

(footnote continued)

the public interest and so were not required to show active supervision. The same result would seem to follow a fortiori with respect to state regulatory agencies.

19/ On this point, the Court of Appeals decision also conflicts with decisions of the Ninth and Second Circuits. See Patrick v. Burget, 800 F.2d 1498, 1507 (9th Cir. 1986), cert. granted, 108 S. Ct. 65 (1987) (agency's action is immune if it is within the scope of, and contemplated by, the agency's statute, regardless of whether it was taken in good or bad faith), and Cine 42nd Street Theater Corp. v. Nederlander Org., 790 F.2d 1032, 1043-44 (2d Cir. 1986) ("the enabling statute must affirmatively designate a particular area to be regulated, provide the methods of regulation, and create

(footnote continued)

In Town of Hallie, the Court held that a statute authorizing municipalities to provide sewage treatment services constituted sufficient state authorization of Eau Claire's policy of tying such services to sewage collection and transportation services to exempt the city from antitrust liability, even though the statute expressly authorized neither tying arrangements nor anticompetitive conduct in general. The Court said:

> The Towns' argument amounts to a contention that to pass the "clear articulation" test, a legislature must expressly state in a statute or its legislative history that it intends

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(footnote continued)

grounds for a reasoned belief that some anticompetitive activity could be envisioned").

> for the delegated action to have anticompetitive effects. This contention embodies an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalog all of the anticipated effects of a statute of this kind.

Id. at 43. Thus, the Court concluded, a state policy "to displace competition with regulation in the area of municipal provision of sewage services" was established by a statute authorizing municipalities to provide such services, and was sufficient to exempt anticompetitive municipal conduct not specifically authorized by statute from challenge under the antitrust laws. Id.

Similarly, in Southern Motor Carriers, the Court held that common carriers which join together to propose rates to a state ratemaking agency are protected by the state action doctrine

from liability under the antitrust laws, even though collective action was not compulsory or even specifically permitted by state statute. The Court said it was enough that the state had determined that rates would be fixed by a regulatory agency rather than the market:

> If more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness.

Id. at 64.

The Massachusetts Legislature established the Pharmacy Board to license and discipline the business and profession

of pharmacy. Although the Legislature provided much guidance in the statutes, it delegated power to the Board to promulgate substantive rules to govern the professional conduct of those licensed by the Board. While the Court of Appeals appears to have thought that the Board's authority to license, regulate and discipline did not sufficiently demonstrate a legislative policy to supplant competition, professional licensing programs have long been criticized on the ground that they unreasonably interfere with business decisionmaking.[20/]

20/ Indeed, such arguments at one time were adduced as a basis for invalidating parts of state licensing schemes under the Due Process Clause. Ligett Co. v. Baldridge, 278 U.S. 105 (1928) (business may be regulated only if the regulation "bears a real and substantial relation to the public health, safety, morals, or some other phase of the general wel-

(footnote continued)

Since in establishing this regime of law, the Massachusetts Legislature manifestly intended to displace competition in pharmacy with regulation, the Board's regulations, whether or not specifically authorized by statute,[21/] are immune to antitrust scrutiny under Town of Hallie and Southern Motor Carriers.

(footnote continued)

fare"), overruled, North Dakota Pharmacy Board v. Snyder's Drug Stores, Inc., 414 U.S. 156, 167 (1973). A theory which this Court has called "a derelict in the stream of the law," id., ought not to be salvaged and reflagged under the banner of the antitrust laws without a clearer signal from Congress that such is its intent.

21/ In fact, however, the Board's regulations are closely linked to specific statutory provisions, as the Board demonstrated below. Pet. App. A75-79.

IV. THE BOARD'S CLAIM OF IMMUNITY FROM ANTITRUST SCRUTINY UNDER THE STATE ACTION DOCTRINE IS APPROPRIATE FOR DECISION IN THIS SUBPOENA ENFORCEMENT PROCEEDING.

Petitioners do not doubt the power of the Commission to investigate matters which fall within the broad statutory authority conferred by its Act, 15 U.S.C. § 45(a). Pet. App. A3-4. See United States v. Morton Salt Co., 338 U.S. 632, 652 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208-209 (1946). But Congress has not given the Commission power to compel compliance with its own subpoenas. Instead, it has directed the Commission to apply to the federal district courts for enforcement. 15 U.S.C. § 46. Nor are the courts restricted to a ministerial role in subpoena enforcement proceedings. Oklahoma Press Publishing Co. v. Walling, 327 U.S.

at 216-17 & n. 57. Subjects of the Commission's investigations "may and should have protection from unlawful demands made in the name of public investigations." United States v. Morton Salt Co., 338 U.S. at 652. The courts may hear and decide "[t]he issues of authority to conduct the investigation, relevancy of the material sought, and breadth of the demand . . . ." Oklahoma Press Publishing Co. v. Walling, 327 U.S. at 217 n. 57. See Federal Trade Commission v. American Tobacco Co., 264 U.S. 298, 305-07 (1924). A claim of "absolute or universal immunity" from the provisions of the statute said to authorize an investigation is an "appropriate defense" to a subpoena enforcement proceeding. See Oklahoma Press Publishing Co. v. Walling, 327 U.S. at 208, 211-212

(discussing Myers v. Bethlehem Corp., 303 U.S. 41 (1938)). See also Federal Trade Commission v. Claire Furnace Co., 274 U.S. 160, 174 (1927).

The issue presented in this petition is well-suited for determination at this time. The state action doctrine established in Parker v. Brown, 317 U.S. at 350-52, and refined in subsequent decisions of this Court protects state governmental action from scrutiny under the federal antitrust laws. "The only requirement is that the action be that of 'the State acting as a sovereign.'" Hoover v. Ronwin, 466 U.S. 558, 574 (1984), quoting Bates v. Arizona State Bar, 433 U.S. 350, 360 (1977). The issue is thus clear. Cf. McKart v. United States, 395 U.S. 184, 194 (1969) (courts should not interfere with agency unless

it has "clearly exceeded its jurisdiction."). Moreover, this Court has previously decided a similar, but more complex, claim in a subpoena enforcement proceeding. See Oklahoma Press Publishing Co. v. Walling, 327 U.S. 208 (1938) (newspaper publisher claimed "total immunity" under the first and fourth amendments to subpoena enforcement proceedings under the Fair Labor Standards Act). See also United States v. Morton Salt Co., 338 U.S. at 647-651.

The Board's claim should not be put off. The state action doctrine as it pertains to the liability of state regulatory agencies to prosecution (or civil suit), is surely not, as the Commission ruled, merely a "substantive defense" which may be raised only after the Commission issues a complaint alleging a

violation of the antitrust laws. Pet. App. A30. Rather, it is by nature a shield against federal antitrust investigation itself. See Hoover v. Ronwin, 466 U.S. 558, 567-568 (1984) (state actors "are exempt from the operation of the antitrust laws"); Community Communications Co., Inc. v. City of Boulder, 455 U.S. at 51 (state actors are "exempt from antitrust scrutiny").

It cannot reasonably be maintained that Congress, while excluding state action from scrutiny under the federal antitrust laws out of respect for principles of federalism, id. at 54, nevertheless authorized the compulsory examination of state officials under oath before a federal tribunal concerning their official conduct, in order to determine whether they shall be subject to the

antitrust laws. See Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 553 & n. 16, 105 S.Ct. 1005, 1019 & n. 16 (1985) ("the states . . . have been able to exempt themselves from a wide variety of obligations imposed by Congress under the Commerce Clause," citing Sherman Act, as construed in Parker v. Brown, as one example). The same congressional respect for state autonomy which animated Parker also stands against judicial tolerance of the Commission's unlawful investigation. Cf. McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, (1963) ("the presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial

resolution of the controversy over the [National Labor Relation] Board's power.")

The Commission's subpoenas serve no lawful purpose because there are manifestly no circumstances under which the information gained through the contemplated investigation could justify an enforcement action against the Board or the petitioners under the Federal Trade Commission Act. Cf. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 n. 15 (1975) ("The subject of any inquiry [by Congress] always must be one 'on which legislation could be had'"), quoting McGrain v. Dougherty, 273 U.S. 135, 177 (1927). Nor does the question of statutory interpretation of which petitioners seek review implicate the discretion or expertise of the Commission. See McKart v. United States, 395

U.S. 185, 197-199 (1969).[22/] As petitioners have exhausted all administrative remedies which are available to quash the subpoenas and the Commission has had a full opportunity to express its views on the scope of its authority to investigate and consider enforcement actions against state agents like petitioners, this Court should grant review of the important question presented. See id. at 204-207 (White, J., concurring in the result).

22/ A decision of this Court denying enforcement of the subpoenas in this matter would not affect the Commission's authority in the vast majority of cases in which private parties claim state action immunity by reason of their conformity with governmental directives. Cf. id. at 200.

CONCLUSION

The decision below holds that the Commission may examine the members of the Massachusetts Board of Registration in Pharmacy under oath to determine the justifications for and the reasonableness of their regulatory activities, in connection with a "law enforcement investigation" of the Board's regulations. Although this Court has not resolved the question thus decided, the Court of Appeals arrived at its decision by means which clearly conflict with the decisions of this Court, as well as the decisions of the Ninth, Fifth, and Second Circuits. Moreover, the effect of the decision is to trammel state regulatory authority without clear congressional warrant.

For these reasons, the Court should grant the writ of certiorari, and should

review and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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(2)

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No. 87-

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IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES F. MONAHAN, RICHARD DUDLEY, JEFFREY ROSS, CHESTER BABINEAU, EILEEN DUMOUCHEL, ANTHONY LAMONICA, MORRIS LEDERMAN, JOHN STALLWORTH, and ROMULUS DENICOLA,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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EDITOR'S NOTE

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1392

FEDERAL TRADE COMMISSION,

Petitioner, Appellee,

v.

CHARLES F. MONAHAN, ET AL.,

Respondents, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. William G. Young.
U.S. District Judge]

Before

Breyer and Selya, Circuit Judges,
and Lageux,*/ District Judge.

November 4, 1987

BREYER, Circuit Judge. In August 1985, the Federal Trade Commission

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*/ Of the District of Rhode Island, sitting by designation.

("FTC") told the Massachusetts Board of Registration in Pharmacy ("the Board") that it would investigate three Board rules to see whether these rules unreasonably restrained competition and hurt consumers. The first rule essentially prohibited advertising in which one pharmacist claimed superiority to (or disparaged) another; the second rule prohibited mail order pharmacies; and the third rule prevent pharmacies from establishing "branch offices" or "pick-up stations", say, at work places, where patients could drop off, and pick up, prescriptions that the "main office" (in the interim) would fill in batches. See Mass. Regs. Code tit. 247, §§ 7.00(7), (14), (26) (1979), subsequently amended, Feb. 6, 1987. (See Appendix.)

The FTC asked the Board to cooperate with the investigation. The Board

refused to do so. The FTC then issued subpoenas, which the Board resisted, and which the FTC eventually asked the district court to enforce. See 15 U.S.C. § 49 (1982). The distrit court ordered the subpoenas enforced, and the Board now appeals that enforcement order. We believe the order is legally proper.

The Board concedes that the FTC has broad legal power to issue investigative subpoenas. See United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) (subpoenas should be enforced if the inquiry is "within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant"); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 214 (1946) ("Congress has authorized the Administrator, rather than the district courts in the

first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations"); Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943) (subpoenas enforceable unless "plainly incompetent or irrelevant to any lawful purpose"). But the Board says that the FTC has no "lawful purpose" in investigating its potential antitrust violations because, as a state regulatory agency, it is "immune" from the antitrust laws. See Hallie v. Eau Claire, 471 U.S. 34 (1985); Hoover v. Ronwin, 466 U.S. 558 (1984); Parker v. Brown, 317 U.S. 341 (1943). The Board seems to take the view that this immunity protects its original regulations from investigation no matter how harmful to competition or to consumers they may turn out to be. This, however, is not so.

For one thing, a subordinate state governmental unit enjoys antitrust "immunity" only when it acts pursuant to a "clearly articulated and affirmatively expressed" state policy. Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Interface Group, Inc. v. Massachusetts Port Authority, 618 F.2d 9, 13 (1st Cir. 1987) (hereinafter "Massport"). The Board is a subordinate governmental unit. See Hoover, 466 U.S. at 568 (indicating that for immunity purposes, a state agency is equivalent to a municipality, not the legislature itself); Massport, 816 F.2d at 13. But we can find no "clearly articulated and affirmatively expressed" state policy that guarantees the Board its protection. Of course, the state has authorized the Board to regulate pharmacy advertising, branching, and other such practices. See

Mass. Gen. Laws ch. 13, §§ 22-25 (1984); Mass. Gen. Laws ch. 94C, §§ 1-31 (1984); Mass. Gen. Laws ch. 112, §§ 24-42A, 61-65 (1984). But we do not know for sure that this is all that the Board is doing. The state statutes do not permit the Board, under the guise of regulation, and without legitimate purpose, simply to raise consumer prices or to inconvenience workers by making them travel farther for prescriptions. Cf. United States v. Texas State Board of Public Accountancy, 464 F. Supp. 490 (W.D. Tex. 1978), aff'd with minor modifications per curiam, 592 F.2d 919 (5th Cir.), cert. denied, 444 U.S. 925 (1979). But cf. First American Title Co. v. South Dakota Land Title Association, 714 F.2d 1439 (8th Cir. 1983), cert. denied, 464 U.S. 1042 (1984). Did the Board do so here? Has it engaged in other unreason-

able activities? Were its activities justified by legitimate regulatory purposes? Even if they were not, were those activities so closely related to legitimate agency activities as to warrant immunity? We cannot answer these questions until we know more precisely what those activities are. We, like the FTC, must wait to see the results of the investigation before we know whether, or the extent to which, the activity falls within the scope of a "clearly articulated and affirmatively expressed" state policy.

For another thing, where "state regulation by a private party is involved," and where there is a "gauzy cloak of state involvement over what is essentially a private" anticompetitive activity, California Retail Liquor Dealers Associa-

tion v. Midcal Aluminum, Inc., 445 U.S. 97, 106 (1980), the state, in order to obtain antitrust immunity, "must supervise actively" the activity in question. Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 57 (1985). Whether any "anticompetitive" Board activities are "essentially" those of private parties depends upon how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists. See Mass. Gen. Laws ch. 13, § 22 (1984). Again, we cannot now say, without knowing more facts, whether or not this additional "state supervision" condition will apply.

The Board points out that in Massport, 816 F.2d at 10-13, we looked only at an antitrust complaint and found that Massport, a state agency, was "immune"

from the plaintiff's antitrust attack. We wrote there that the complaint's factual statements, which the plaintiff said revealed "exclusive dealing," also revealed activities that directly implemented "policies that govern which airlines are to use which terminals, where and how they are to be serviced, and whether or when they can taxi from one terminal to another," all activities which lie "close to the heart of Massport's basic purpose." Massport, 816 F.2d at 13.

Massport, however, is clearly distinguishable. Because Massport was not a subpoena enforcement case, we could look at the complaint and directly compare the claimed activities with Massport's authorizing legislation. Moreover, in Massport we could not conceive how the activities attacked could fall outisde

the area of immunity delineated by clear state policy; in this case, as our previous discussion suggests, that is not so. Rather, here we do not know whether the Board's activities will turn out to lie "close to," or far from, the state statutes' basic purpose; nor do we know whether they will turn out to fall inside or "outside that area of [agency] autonomy involving '"ordinary" [agency] errors or abuses in the administration of powers conferred by the state.'" Massport, 816 F.2d at 13-14, quoting Llewellyn v. Crothers, 765 F.2d 769, 774 (9th Cir. 1985) (quoting Areeda, "Antitrust Immunity for 'State Action' after Lafayette", 95 Harv. L. Rev. 435, 453 (1981)). All depends upon precisely what conduct turns out to be at issue, its harms, its justi-

fications, and its relation to the agency's basic statutory mission.

This factual uncertainty is precisely why this "sort of dispute" ought not to be

> settled in a subpoena enforcement proceeding. An agency's investigations should not be bogged down by premature challenges to its regulatory jurisdiction. These subpoenas do not fit within the narrow exception proscribing agency investigations that wander unconscionably far afield; the Commission's regulatory jurisdictions over appellants may be clouded but it is not plainly spurious.

Federal Trade Commission v. Swanson, 560 F.2d 1, 2 (1st Cir. 1977) (citations omitted).

The judgment of the district court is Affirmed.

APPENDIX

The original and amended versions of the three regulations at issue are as follows:

Original Versions

247 CMR 7.00(7) - "A pharmacist or pharmacy shall not, by advertising or otherwise, claim any professional superiority in the dispensing of devices or drugs; nor shall a pharmacist or pharmacy advertise services or products in a manner that disparages the ability, character or integrity of other pharmacists."

247 CMR 7.00(14) - "A pharmacist or pharmacy shall not participate in any mail order business, or in any plan, agreement or arrangement that adversely

affects the pharmacist-patient-practitioner relationship."

247 CMR 7.00(26) - "(a) A pharmacy, or anyone acting in behalf of said pharmacy, shall not enter into any scheme, arrangement or agreement for collecting, by itself or other persons, prescriptions at industrial plants, places or [sic] business, or any other sites where specific groups of people are regularly employed or affiliated. (b) A pharmacy, or anyone acting in behalf of said pharmacy, shall not fill any prescriptions which have been collected through solicitation, by itself or others, at industrial plants, places of business, or any other sites where specific groups of people are regularly employed or affiliated, and which prescriptions have been, di-

rectly or indirectly, batch-delivered to said pharmacy. (c) The provisions set forth in 247 CMR 7.00(26)(a) and 7.00(26)(b) shall not apply to prescriptions which have been issued to patients who are being treated within a licensed extended care facility or within a licensed hospital facility, whenever such prescriptions have been collected by the pharmacy itself or delivered to said pharmacy by an authorized agent of said patients."

Mass. Regs. Code ch. 247, §§ 7.00(7), 7.00(14), 7.00(26) (1979).

New Versions

247 CMR 7.00(7) - "A pharmacist shall not utilize advertising which makes

claims of professional superiority that he or she cannot substantiate."

247 CMR 7.00(14) - "No pharmacist or pharmacy shall engage in the sale of controlled substances through the mail or by common carrier. Notwithstanding the foregoing, a pharmacist or pharmacy may dispense prescription drugs by mail or common carrier, in a manner consistent with federal law and U.S. postal regulations, to any customer on a temporary basis in the event such customer is unable to present himself or herself at the dispensing pharmacy due to illness, injury or absence, provided that the dispensing pharmacist or pharmacy shall in each such case have available sufficient information to contact such customer and the prescribing physician."

247 CMR 7.00(26) - "(a) No pharmacy, or anyone acting in behalf of a pharmacy, shall collect prescriptions at industrial plants, places of business, or any other site where specific groups of people are regularly employed or affiliated unless the precriptions are collected in person by a pharmacist or other pharmacy employee and then are distributed to the patient or an authorized agent of the patient by a pharmacist. (b) The provisions set forth in 247 CMR 7.00(26)(a) shall not apply to prescriptions which have been issued to patients who are being treated within a licensed extended care facility or within a licensed hospital facility, whenever such prescriptions have been collected by the pharmacy itself or delivered to said pharmacy by an authorized agent of said patients."

Mass. Regs. Code ch. 247 §§ 7.00(7), 7.00(14), 7.00(26) (1987).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FEDERAL TRADE COMMISSION, Petitioner,	)	
v.	)	MBD No. 86-848-Y
CHARLES F. MONAHAN, et al., Respondents.	)	

MEMORANDUM AND ORDER

YOUNG, D.J. April 13, 1987

This is a summary proceeding filed by the Federal Trade Commission (the "Commission") pursuant to Section 9 of the Federal Trade Commission Act ("Act"), 15 U.S.C. § 49, seeking the enforcement of nine Commission subpoenas issued on May 15, 1986.

In August, 1985, the Commission began conducting an investigation to determine whether certain regulations enacted by the Massachusetts Board of Registration in Pharmacy (the "Board") constituted

unfair methods of competiton in violation of Section 5 of the Act. Initially the Board provided the Commission with the documents requested by the Commission in its investigation. In December, 1985, however, the Board informed the Commission that it would no longer voluntarily cooperate in the Commission's investigation. On May 15, 1986, the Commission issued nine investigative subpoenas directed to various Board members.

On June 12, 1986, the Board filed a petition to quash the subpoenas, raising three arguments in an effort to halt the Commission's further investigation. First, the Board claimed immunity from scrutiny under the federal anti-trust laws pursuant to the theory that its conduct was state action. Second, the Board claimed that the Commission, in conduct-

ing its investigation, was unconstitutionally exercising executive powers as an agent of the legislative branch of the government. Third, the Board argued that, as matter of discretion, since similar jurisdictional issues are under advisement before the full Commission in an investigation of a sister state agency (the Massachusetts Board of Optometry), any decision in this case should be delayed pending the ruling of the full Commission in that case.

On July 15, 1985, an FTC Commissioner denied the Board's petition to quash. On July 21, 1985, the Board appealed this ruling to the full Commission, which denied the request because it agreed with the Commissioner's ruling and no new issues of merit were raised regarding the quashing of the subpoenas. The Board

then advised the Commission that it would not comply with the subpoenas voluntarily, and the Commission brought the present action before the Court.

I.

The Board argues that it is immune from investigation by the Commission on the theory that its conduct is state action and thus beyond the reach of the Act. The Board relies primarily upon the Supreme Court's construction of the Sherman Act in Parker v. Brown, 317 U.S. 341 (1943). In Parker, the Supreme Court held that the Sherman Act does not apply to actions taken by the state as a sovereign. Thus, actions taken by the State of California to protect the raisin industry were not in violation of the Sherman Act.

> It derived its authority and efficacy from the legislative command of the state and was not intended to operate or become effective without that command.

Id. at 350. The Supreme Court has expressly rejected, however, the argument that all state agencies are protected from the reach of the anti-trust laws by Parker.

> Plainly petitioners are in error in arguing that Parker held that all governmental entities, whether state agencies or subdivisions of a State, are, simply by reason of their status as such, exempt from antitrust laws.

City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389, 408 (1978). In a case cited frequently in Lafayette, the Supreme Court emphasized again that to be protected by state action immunity an action must be compelled by the state acting as sovereign.

> The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anti-competitive activities for the benefit of its members.

Goldfarb v. Virginia State Bar, 421 U.S. 773, 791 (1975)(footnote omitted).

In addition, the Court of Appeals for the First Circuit has indicated strongly that, absent any express statutory pronibitions, subpoenas such as those involved in this proceeding, ought be promptly enforced.

> An agency's investigations should not be bogged down by premature challenges to its regulatory jurisdiction.... These subpoenas do not fit within the narrow exception proscribing agency investigations that wander unconscionably far afield; the Commission's regulatory jurisdiction over appellants may be clouded but it is not plainly suprious.

Federal Trade Commission v. Swanson, 560 F.2d 1, 2 (1977) (emphasis added) (inves-

tigation of tour operators as part of Federal Trade Commission's investigation of package tour industry).

As the Commission's assertion of jurisdiction here is not plainly supri-ous, its subpoenas ought be enforced.

II.

The Board also argues that the Commission, in conducting an investigation to prosecute possible violations of the Federal Trade Commission Act, is exercising executive powers and that this constitutes a violation of the separation of powers implicit in the Constitution of the United States. This argument is premature since the outcome of the investigation cannot presently be fore-

seen.[1/]

Finally, the Board also argues that enforcement of these subpoenas would be "inequitable" pending the resolution of similar issues raised in the case involving the sister state agency, In the Matter of the Massachusetts Board of Registration in Optometry, FTC Docket No. 9195. However, as the appeal process in that case could take up to three years to resolve and involves different statutes and statutory schemes, it would in

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1/ See also Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935):

> To the extent that it [the Federal Trade Commission] exercises functions -- as distinguished from executive power in the constitutional sense -- it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial department of the government.

fact be "inequitable" not to enforce these subpoenas.

For the reasons stated above, the Commission's petition for an Order by this Court compelling members of the Board to testify is ALLOWED.

SO ORDERED.

/s/
WILLIAM G. YOUNG
UNITED STATES DISTRICT JUDGE

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF THE SECRETARY July 15, 1986

William L. Pardee, Esq.
Assistant Attorney General
Government Bureau
1 Ashburton Place, Room 2019
Boston, MA 02108

RE: In the Matter of Investigation of the Massachusetts Board of Registration in Pharmacy; File No. 851-0145

Dear Mr. Pardee:

This is to advise you of the Federal Trade Commission's ruling on the petition to quash subpoenas that you filed on behalf of your clients, Charles F. Monahan, et al. (the board), in the above-captioned matter. The ruling set forth herein has been made by Commissioner Terry Calvani pursuant to authority delegated under Commission Rule of Practice 2.7(d)(4). This constitutes the Commission's response under Commission Rule of Practice 2.7(g). See 49 Fed. Reg. 6089

(Feb. 17, 1984).

For the reasons stated below, the petition to quash subpoenas is denied.

I. The Petition

The petition urges that the subpeonas be quashed for the following reasons: (1) the promulgation and enforcement of the board's regulations are sovereign acts of the Commonwealth and therefore immune to challenge under federal anti-trus laws (Pet. at p. 6); (2) in investigating the board's regulations, the Commission is exercising executive powers in violation of the United States Constitution (Pet. at p. 7); and (3) enforcement of the subpoenas should be stayed pending a final disposition of In the Matter of Massachusetts Board of Regis-

tration in Optometry, FTC No. 9195, because similar jurisdictional issues are raised therein (Pet. at pp. 8-9). We consider each contention in turn.

II. State Action Immunity

In Parker v. Brown, 317 U.S. 341 (1943), the Supreme Court held that the Sherman Act does not apply to actions taken by the state as sovereign. The board argues that it is acting as the sovereign, and therefore entitled to Parker immunity, because it "has acted and is acting pursuant to an express delegation of authority by the Legislature

of the Commonwealth" (Pet. at p. 6).*/

In analyzing petitioners' state action argument, we first note that as a general matter, "an agency has jurisdiction to determine the scope of its authority, in the first instance, and that such matters will not be determined in a proceeding to enforce a subpoena." CAB v. Deutsche Lufthansa Aktiengesellschaft, 591 F.2d 951, 952 (D.C. Cir. 1979). Substantive defenses properly raised in an administrative proceeding are generally premature when raised in defense to compliance with a subpoena.

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*/ More specifically, the board alleges it is authorized to "make such rules and regulations as it deems necessary to enable it to properly enforce the provisions of law relating to the retail drug business and pharmacy, and regarding any other matter within its jurisdiction," and to "adopt, amend or repeal rules of professional conduct" (Pet. at p. 2).

FTC v. Texaco, Inc., 555 F.2d 862, 879 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977).

In any event, the fact that the board is authorized to promulgate certain rules and regulations concerning the retail drug business and pharmacy does not necessarily mean that its actions are those of the sovereign. Goldfarb v. Virginia State Light Co., 435 U.S. 389, 410 (1978) ("Goldfarb . . . made it clear that, for purposes of the Parker doctrine, not every act of a state agency is that of the State as sovereign"). The board must show more: it must at least demonstrate that the Commonwealth "clearly intends to displace competition in a particular field with a regulatory structure . . ." Southern Motor Carriers Rate Conference v. U.S., 105 S.Ct. 1721, 1731 (1985).

Because no such showing has been made, state action immunity provides the board no basis to object to the subject subpoenas.

III. The Constitutional Challenge

The board further challenges the Commission's authority to issue the subpoenas on the ground that "[i]n initiating the investigation of the Board's regulations preparatory to an action to enforce the antitrust laws of the United States, the Commission has exercised and is purporting to exercise executive powers in violation of the express terms of the United States Constitution, and the principle of the separation of powers implicit therein" (Pet. at p. 7).

The board apparently contends that those provisions of the FTC Act that

authorize the Commission to conduct anti-trust law enforcement investigations, see, e.g., 15 U.S.C. §§ 46 and 49, are facially unconstitutional because the provisions allegedly infringe on the obligation of the President to "take care" that the laws are faithfully enforced. However, members of the board have merely been subpoenaed to appear and to testify. Even assuming it is not premature for them to raise their constitutional challenge in a petition to quash investigative process, the board's constitutional argument is foreclosed by Humphrey's Executor v. United States, 295 U.S. 602 (1935).

IV. The Requested Stay Pending Final Disposition of In the Matter of Massachusetts Board of Registration in Optometry, FTC No. 9195

Finally, the board argues that one of its sister agencies, the Massachusetts Board of Registration in Optometry, is the respondent in an administrative proceeding brought by the Commission. In that action, the Board of Registration in Optometry has allegedly asserted that the Commission lacks jurisdiction to investigate or take actions against its regulatory activities. Thus, pending a decision there by the Administrative Law Judge, the board requests that the subpoenas be quashed, and that further use of compulsory process be stayed.

The fact that similar issues may be contested in a different administrative proceeding provides no basis for either

quashing the subpoenas here or staying further use of compulsory process. The proceedings are separae and independent. Beyond that, by Initial Decision dated June 20, 1986, Administrative Law Judge Timony rejected the jurisdictional arguments raised by respondent in the Massachusetts Board of Registration in Optometry matter. See Initial Decision at pp. 43-47.

V. Conclusion

For the foregoing reasons, the petition to quash subpoenas of Charles F. Monahan, et al. is denied. Petitioners are directed to comply with the subpoenas on or before July 31, 1986.

Pursuant to Rule 2.7(f), within three days after service of this ruling, petitioners may file with the Secretary of

this Commission a request that the full Commission review the ruling. Commission Rule of Practice 4.4(b) provides that a document shall be deemed filed when it is received by the Office of the Secretary. See 16 C.F.R. 4.4(b) (1986). The timely filing of such a request shall not stay the return date of this ruling, unless the Commission otherwise specifies.

By direction of the Commission.

/s/
Emily H. Rock
Secretary

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF THE SECRETARY June 30, 1986

William L. Pardee, Esq.
Assistant Attorney General
Government Bureau
One Ashburton Place, Room 2019
Boston, MA 02108

Re: In the Matter of Investigation of the Massachusetts Board of Registration in Pharmacy; File No. 851-0145

Dear Mr. Pardee:

The Commission has considered the Request for Stay Pending Review and Requ st for Review that you filed on behalf of your clients, Charles F. Monahan, et al., in the above-captioned matter on July 21, 1986.

The Commission has determined that the Request for Review to the full Commission does not raise any new or different issues regarding the requested quashing of the subpoenas, and that the peti-

tion was properly denied for the reasons stated in the July 15, 1986 letter ruling. Accordingly, the full Commission concurs with and hereby adopts that letter ruling in this matter.

In addition, the Commission denies the request for a stay of the July 31, 1986 return date now set for response to the subpoenas.

For the foregoing reasons, the Request for Review is denied and petitioners are directed to comply with the July 15, 1986 letter ruling on the petition at the time and place specified therein.

By the Commission.

/s/
Bejamin I. Berman
Acting Secretary

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1392

FEDERAL TRADE COMMISSION,
Petitioner, Appellee,

v.

CHARLES F. MONAHAN, ET AL.,
Respondents, Appellants.

JUDGMENT

Entered: November 4, 1987

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

Francis P. Scigliano, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

FEDERAL TRADE COMMISSION Petitioner, v. MR. CHARLES F. MONAHAN, et al., Respondents	No. MBD 86-348

Petition For an Order Requiring Respondents To Appear And Testify In An Investigation Being Conducted By The Federal Trade Commission

Petitioner, the Federal Trade Commission (the "FTC" or "Commission"), by its undersigned attorneys and pursuant to Sections 6 and 9 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 46 and 49 petitions this Court for an order requiring the nine respondents to appear and to testify in accordance with the subpoenas ad testificandum issued by

petitioner on May 15, 1986, in the course of a law enforcement investigation being conducted by the FTC (FTC File No. 851-0145). Petitioner further alleges the following:

1. Petitioner is an administrative agency of the United States government organized and existing pursuant to the FTC Act, 15 U.S.C. § 41 et seq. The Commission is authorized and directed by Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, to prohibit unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.

2. The Commission is empowered by Section 3 of the FTC Act, 15 U.S.C. § 43, to prosecute any inquiry necessary to its duties in any part of the United States and by Section 6 of the FTC Act

to conduct investigations and to gather and compile facts. Section 9 of the FTC Act further emplowers the FTC, inter alia, to compel by subpoena the production of documents and the attendance and testimony of witnesses relating to its inquiries. Such production of documentary evidence and testimony may be required from any place in the United States at any designated place of hearing.

3. Respondent, Charles F. Monahan, is the Executive Secretary of the Massachusetts Board of Registration in Pharmacy (the Board), which has its offices at the Leverett Saltonstall Building, 15th Floor, 100 Cambridge Street, Boston, Massachusetts, in this judicial district.

4. Respondents, Richard Dudley, Jeffrey Ross, Chester Babuneau, Eileen

Dumouchel, Anthony Lamonica, Morris Lederman, and John Stallworth, are members of the Board.

5. Respondent, Romulus L. DeNicola, is a former Executive Secretary and former member of the Board.

6. The Board is an agency created and operating under Chapter 13, §§ 22-25 of the General Laws of the State of Massachusetts. The Board, by statute, consists of seven members appointed by the State Governor, six of whom must be registered pharmacists, and one of whom is a representative of the public. Id (Sect. 22).

7. Jurisdiction over this cause, and over the respondents and the power to enforce the FTC's subpoenas and to issue the order here prayed for, is conferred upon this Court by Section 9 of the FTC Act, 15 U.S.C. § 49, which pro-

vides that any District Court of the United States within the jurisdiction of which an inquiry is conducted by the FTC may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership or corporation, issue an order requiring such person, partnership or corporation to appear before the FTC, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question.

8. The investigation, in the course of which the FTC's subpoenas were issued and served, is being conducted, inter alia, in this distrct.

9. By letter dated August 14, 1985 (Exh. A), FTC antitrust attorneys sought the Board's voluntary cooperation in an investigation of whether certain specific regulations adopted by the Board constituted unfair methods of competition in

violation of Section 5 of the FTC Act. The Commission is conducting similar inquiries in a number of other states.

10. On November 4, 1985, the FTC, by formal vote, issued a resolution (Exh. B) authorizing the use of compulsory process in state pharmacy board investigations, which resolution described the purpose and scope of the inquiries.

11. After initially providing some documents, the Board refused all further cooperation. By letter dated December 11, 1985 (Exh. C), the Board's counsel notified the Commission that the Board would not voluntarily allow the FTC to conduct interviews with members of the Board or with the Board's administrative staff.

12. In view of the Board's refusal to cooperate voluntarily, FTC staff

sought the issuance of nine testimonial subpoenas directed to the members of the Board, and to its current and former Executive Secretaries, which were signed by Commissioner Mary L. Azcuenaga on May 15, 1986 (Exh. D).

13. On June 12, 1986, the respondents filed a petition to quash the subpoenas pursuant to Section 2.7(d) of the FTC's Rules of Practice and Procedure, 16 C.F.R. § 2.7(d) ("FTC Rule 2.7(d)") (Exh. E). The Board argued that state regulatory agencies are totally immune from federal antitrust investigation and that the exercise of prosecutorial functions by the FTC violates the Constitution. They further asked that the Commission stay the requirement to appear and testify pending a ruling by the Administrative Law Judge ("ALJ"), in an adjudicative proceeding then pending

before the FTC. In the Matter of Massachusetts Board of Registration in Optometry, FTC Docket No. 9195 ("Mass. Optometry").

14. On July 15, 1985, FTC Commissioner Terry Calvani, acting pursuant to authority delegated under FTC Rule 2.7(d)(4), denied the respondent's petition to quash (Exh. F). In rejecting the Board's claims that it is totally immune from investigation by federal antitrust authorities, Commissioner Calvani noted both the settled rule that substantive defenses to administrative charges are prematurely raised in response to an administrative subpoena. He also based his rulings on the complete lack of legal support for the argument that any entity of state government with regulatory authority is automatically exempt from federal antitrust investi-

gation. Commissioner Calvani also rejected the respondents' constitutional argument, noting that it was foreclosed by the Supreme Court's decision in Humphrey's Executor v. United States, 295 U.S. 602 (1935). Finally, he rejected the respondents' request that the investigation be suspended pending the resolution of the Mass. Optometry adjudication both because the proceedings were separate and independent and because the ALJ had decided the case and rejected the jurisdictional issues raised by the Mass. Optometry respondent.*/

15. Pursuant to FTC Rule 2.7(f), the respondents filed an appeal of Commissioner Calvani's ruling to the full

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*/ The ALJ's opinion, as yet unpublished, is Attachment 1 hereto.

Commission on July 21, 1986 (Exh. G). Respondents requested that the Commission suspend the pharmacy investigation indefinitely until the respondent in the separate Mass. Optometry adjudication had exhausted all avenues of administrative and appellate review.

16. While this appeal was pending, counsel for the respondents advised the Commission that in no event would the respondents comply with the subpoenas (Exh. H).

17. On July 30, 1986, the Commission denied the appeal and directed compliance (Exh. I).

18. This Petition and the exhibits attached hereto are verified by sworn affidavit (Exh. J).

19. No respondent has complied with his or her subpoena.

20. No previous application has been made to this or any other court for the relief prayed for herein.

WHEREFORE, the Commission respectfully invokes the aid of this court, and prays:

(1) That the Court issue an order directing each respondent to show cause why each respondent should not comply with and obey the subpoena;

(2) That the Court enter an order directing each respondent to appear and testify; and

(3) That petitioner be given such other and further relief as the Court may determine to be just and proper.

Respectfully submitted,

ROBERT D. PAUL
General Counsel

ERNEST J. ISENSTADT
Assistant General Counsel

FREDERICK E. DOOLEY, JR.
Attorney

Attorneys for Petitioner
Federal Trade Commission
Sixth St. and Pennsylvania Ave.,
Washington, D.C. 20580
(202) 523-3619; (202) 326-2443

[Exhibits C, D, E, F, G, H, I
to the Petition omitted]

Exhibit A to the Petition

BUREAU OF COMPETITION
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

August 14, 1985

Mr. Richard Dudley
President
Massachusetts Board of Registration
in Pharmacy
Leverett Saltonstall Building
15th Floor
100 Cambridge Street
Boston, Massachusetts 02202

Re: Massachusetts Board of Registration in Pharmacy
File No. 851 0145

Dear Mr. Dudley:

The Bureau of Competition of the Federal Trade Commission is conducting a nonpublic preliminary investigation to determine whether the regulations promulgated by the Massachusetts Board of Registration in Pharmacy ("the Board"), Mass. Admin. Code tit. 247, §§7.00(7), (14), and (26), may unreasonably restrain competition and injure consumers in vio-

lation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45.

The purpose of this letter is to ask for your cooperation in this preliminary inquiry, and to request that you voluntarily submit the documents described below and make available for interview appropriate members of the Board and its staff. This is not a subpoena. We wish to emphasize that neither this inquiry letter nor the existence of this nonpublic investigation should be viewed as an accusation by the Federal Trade Commission or its staff of any wrongdoing by the Board or any of its members.

The first regulation, Mass. Admin. Code tit. 247, §7.00 (7), prohibits claims of professional superiority, and

advertising of services that disparages the ability, character or integrity of other pharmacists. This regulation may unjustifiably prevent pharmacies from communicating effectively to the public truthful information about the services they offer. A rule prohibiting claims of superiority clearly lessens rivalry among competing sellers, and the severity of this effect will depend on the extent to which the rule prevents the communication of truthful information. At a minimum, a prohibition on advertisements that contain claims of superiority restricts comparative advertising, which can be a highly effective means of informing and attracting customers and an important competitive force. When a seller cannot compare the attributes of its services to those of its competitors, the incen-

tive to improve or to offer different products, services, or prices is likely to be reduced. The Board, of course, has a legitimate interest in preventing false, deceptive, or misleading advertising by pharmacies. Nonetheless, restraints on advertising by professional boards should not exceed what is reasonably necessary to prevent advertising through a form or method that is shown, in fact, to have been deceptive. See In re R.M.J., 455 U.S. 191, 202 (1982).

The second regulation, Mass. Admin. Code tit. 247, §7.00(14), prohibits mail order business and any arrangement "that adversely affects the pharmacist-patient-practitioner relationship." The third regulation, Mass. Admin. Code tit. 247, §7.00 (26), prohibits any arrangement whereby prescriptions may be collected,

delivered in batch to a pharmacy, and filled. These rules prohibit the operation of mail order pharmacies and branch office facilities often referred to as "pick-up stations" or "depots". These regulations may limit the ability of pharmacy firms to provide pharmacy services more efficiently by better utilizing pharmacist time, reducing inventory and space costs, and expanding the market areas they serve. Such arrangements may reduce costs and provide increased convenience for consumers. On the other hand, some pharmacists have suggested that the use of mail order pharmacies and pick-up stations may raise concerns about service quality and the security of prescription drugs, and we would be most interested in learning from the Board about these or any other considera-

tions that might justify the restriction on the operation of such facilities or arrangement.

The Supreme Court has affirmed that imposition of unreasonable restraints on competition among professionals can violate the antitrust laws. E.g., National Society of Professonal Engineers v. United States, 435 U.S. 679 (1978). In particular, restraints on truthful advertising imposed and enforced by competing professionals can violate the antitrust laws. American Medical Association, 94 F.T.C. 701 (1979), aff'd 638 F.2d 443 (2d Cir. 1980), aff'd mem. by an equally divided Court, 455 U.S. 676 (1982). Moreover, absent "state action" immunity, the prohibition under the antitrust laws of agreements in restraint of trade en-

compasses regulatory activity by state professional boards. See United States v. Texas State Board of Public Accountancy, 464 F. Supp. 400 (W.D. Tex. 1978), aff'd mem., 592 F.2d 9191 (5th Cir.), cert. denied, 444 U.S. 925 (1979).

Please submit the following documents[1]:

> All documents referring or relating to any of the Regulations[2] or to any predecessor of any of the Regulations, the advertising of professional superiority, mail order pharmacies, or arrangements for collecting prescriptions at locations that are not licensed

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1/ "Documents" means all originals, and non-identical copies, of all information and communications of any kind, whether handwritten, typewritten, printed, taped, or in any other way recorded, wherever located, in the possession or subject to the control of the Board or any of its members.

2/ "Regulations" means Mass. Admin. Code tit. 247, §7.00 (7), (14), and (26).

> as pharmacies, including, but not limited to, minutes or transcripts of meetings or hearings; correspondence; reports, memoranda, or studies; records of formal or informal disciplinary proceedings; and records of formal, informal, or advisory statements, opinions, or advice.

Because we do not know how long the Regulations or any precedessors have been in effect, we are unable at this time to limit the document request to a specific time period. If you believe that any aspect of this request is unduly burdensome, or if you have any questions about it, please let me know as soon as possible. We would consider accepting access to the Board's records, with the right to copy relevant materials, in lieu of document production, if that would be more convenient for the Board. In addition, please feel free to submit any

additional information that you may wish to bring to our attention with respect to the purpose for the Board's restrictions.

Please submit the responsive documents within twenty-one (21) days of this request. You may submit legible photocopies in lieu of original documents. The documents should be sent to N. Scott Sacks, Bureau of Competition, Federal Trade Commission, Suite 841, 600 E Street, N.W., Washington, D.C. 20580.

Under the Federal Trade Commission's Rules of Practice, confidential treatment will be afforded to documents that are submitted voluntarily in lieu of a subpoena. Furthermore, as provided in the FCT Imporvements Act of 1980, all information provided in response to this request will be exempt from disclosure

under the Freedom of Information Act, 5 U.S.C. §552.

We also request the opportunity to interview you and appropriate members of the Board and its staff at mutually convenient times in the Board's offices. We expect the interviews to include the following topics:

-- the procedures of the Board;

-- the origin and history of the Regulations, including the reasons for enacting, amending, and retaining the Regulations;

-- the interpretation of the Regulations and their history of enforcement;

-- the effect of the Regulations on competition in the sale of prescription drugs; and

-- the role of pharmacists and related professional and trade associations in the enactment, amendment, enforcement, and interpretation of the Regulations.

We have tried to make this request reasonably comprehensive without being

unduly burdensome. If you believe that any aspect of this request is unduly burdensome, or if you have any questions about it, please let me know as soon as possible. At the same time, this request should not be considered to be necessarily all-inclusive. As in any investigation, it is possible that we will find it necessary to seek access to additional records or pursue additional lines of inquiry.

If you have any questions concernig this matter, please contact me at (202) 724-1273

Sincerely,

/s/
N. Scott Sacks
Attorney

Exhibit B to the Petition

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Terry Calvani,
Acting Chairman
Patricia P. Bailey
Mary L. Azcuenaga

RESOLUTION DIRECTING USE OF
COMPULSORY PROCESS IN A
NONPUBLIC INVESTIGATION OF UNNAMED
STATE PHARMACY BOARDS

File No. 861 0016

Nature and Scope of Investigation:

An investigation to determine whether unnamed state boards that regulate the pharmacy profession in any of the United States have engaged or are engaging in unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act by placing unreasonable restrictions on advertising or on business practices that offer increased convenience to consumers, such as branch offices and computerized

prescription systems.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation for a period not to exceed two years from the date of issuance of this resolution.

Authority to Condct Investigation:

Sections 6,9, and 10 of the Federal Trade Commission Act, 15 U.S.C. §§46, 49, and 50, as amended; FTC Procedures and Rules of Practice, 16 C.F.R. §1.1 et seq., and supplements thereto.

By direction of the Commission.

/s/
Emily H. Rock
Secretary

ISSUED: November 4, 1985

Exhibit J to the Petition

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

FEDERAL TRADE COMMISSION	)	
Petitioner,	)	No.
v.	)	
CHARLES F. MONAN, et al.,	)	
Respondents.	)	

AFFIDAVIT OF N. SCOTT SACKS

Washington, D.C.)
)
)

N. Scott Sacks, Esquire, being of lawful age, first being duly sworn, deposes and says:

1. That he is an attorney with the Bureau of Competition of the Federal Trade Commission ("FTC") and is assigned as supervising attorney to the FTC investigation entitled Massachusetts Board of

Registration in Pharmacy, FTC File No. 851 0145, and is authorized to execute this affidavit and to verify the contents of the foregoing petition for an order requiring the named respondents to appear and testify in this FTC law enforcement investigation;

2. That enforcement of the subpoenas is critical to the completion of the FTC's investigation. The documents submitted voluntarily by the Massachusetts Board of Registration in Pharmacy ("Board") in response to the staff's August 14, 1985 request for documents (Exh. A) do not identify or discuss the justifications, if any, that may exist to support the regulations that are the subject of the investigation, nor do they contain sufficient information with respect to the interpretation and enforcement of the regulations. Such informa-

tion is necessary for a thorough analysis of the restraints at issue in order that the Commission can make an informed decision as to whether issuance of a complaint would be in the public interest. The enforcement of compulsory process against respondents, who are present or past members of the Board or its staff, is necessary in order to obtain this relevant testimony, given that the Board has refused to make its members and staff available on a voluntary basis;

3. That he has read the contents of the foregoing petition and the exhibits attached thereto; and

4. That the statement of facts contained in the foregoing petition is true and correct to the best of his knowledge and that the exhibits attached to the

petition are true and accurate copies of official FTC records.

/s/
N. Scott Sacks

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FEDERAL TRADE COMMISSION,	)	
Petitioner	)	
v.	)	MBD No. 86-848-Y
CHARLES F. MONAHAN, et al.,	)	
Respondents	)	

REPLY FOR THE RESPONDENTS

I.

1. The respondents, who are the members of the Massachusetts State Board of Registration in Pharmacy (the State Board), and the State Board's present and past executive secretaries, oppose the petition and respectfully pray the Court to deny enforcement of the petitioner's subpoenas ad testificandum. Enforcement should be denied because the subpeonas were issued in aid of an investigation which is wholly beyond the peti-

tioner's authority, since the State Board is immune to the laws enforced by the petitioner. Enforcement should also be denied because the petitioner's investigation constitutes or involves the exercise of executive power, which may not constitutionally be delegated to the petitioner. Alternatively, enforcement should be denied at this time for the reasons set forth hereinafter.

2. The respondents generally admit the factual allegations in the petition, but deny that the petitioner is authorized to conduct this investigation of the State Board and its regulations. The respondents dispute the characterizations of their arguments as well as the legal conclusions set forth in paragraph 14 of the petition. Further replying, the respondents say the following:

II.

3. The State Board is an agency of the Commonwealth of Massachusetts, constituted pursuant to chapter 13, §§ 22-25 of the General Laws of Massachusetts and mandated to regulate the business and profession of pharmacy, as more fully set forth in chapter 94C and chapter 112, §§ 34-42A of the General Laws. Pursuant to chapter 112, § 42A, of the General Laws, the State Board is authorized and empowered to "make such rules and regulations as it deems necessary to enable it to properly enforce the provisions of law relating to the retail drug business and pharmacy and regarding any other matter within its jurisdiction," and to "adopt, amend or repeal rules of professional conduct." Pursuant to Chapter

94C, § 6, of the General Laws, the State Board is authorized and empowered to "promulgate rules and regulations relative to registration and control of the manufacture, dispensing and possession of controlled substances within the Commonwealth." A copy of the provisions of the General Laws administered by or pertaining to the State Board is attached hereto.

4. Under the decisions of the Supreme Judicial Court, a grant of regulatory autority over a profession of a breadth comparable to the power granted the State Board amounts to a grant of "primary responsiblity in the regulation of the practice" of that profession. See Levy v. Board of Registration and Discipline in Medicine, 378 Mass. 519, 524, 392 N.E. 2d 1036, 1039 (1979). An

agency with such authority is not constrained by the specific words of its constitutive act, but rather is authorized to promulgate any rule, substantive or procedural, which is rationally related to its statutory mission and not inconsistent with the statutes. Id. It is well settled as matter of state law, for instance, that the professional licensing boards may promulgate rules designed to promote professionalism even if there is some adverse effect upon competition. See Blue Hills Cemetary, Inc. v. Board of Registration in Embalming and Funeral Directing, 379 Mass. 368, 374, 398 N.E. 2d 471, 476 (1979); Silverman v. Board of Registration in Optometry, 344 Mass. 129, 133-35, 181 N.E. 2d 540, 541-3 (1962) (upholding regulation forbidding optometrists from opening

offices on the premises of commercial or mercantile establishments). See also Raymond v. Board of Registration in Medicine, 387 Mass. 708, 713, 443 N.E. 2d 391, 394 (1982) (Medicine State Board "has the authority to protect the image of the profession" and may discipline physicians "for lack of good moral character, and for conduct that undermines public confidence in the integrity of the profession"). And, where an agency such as the State Board acts within its realm of responsibility, its action is as much the sovereign action of the state as is the legislation under which it operates. See, e.g., Borden, Inc. v. Commissioner of Public Health, 388 Mass. 707, 723, 448 N.E. 2d 367, 378 (1983) ("[A] properly promulgated regulation has the force of law . . . and must be

accorded all the deference due to a statute."). Accordingly, the State Board's regulations are immune from scrutiny under the antitrust and unfair competition laws.

5. As previously stated, the State Board is authorized by G.L. c. 112, § 42A, to promulgate rules of professional conduct. The State Board has adopted a Code of Professional Conduct. A copy of the Code, as in effect prior to November 4, 1986, is attached hereto. The petitioner is investigating rules 7, 14, and 26 of the Code.

6. Rule 7, as in effect prior to November 4, 1986, prohibited pharmacists from claiming professional superiority, or disparaging the ability, character or integrity of other pharmacists, in adver-

tisements. Rule 7 was superseded on November 4, 1986. See Part IV, infra.

7. Rule 14 prohibited pharmacists from participating in any mail order business or entering any plan, agreement or arrangement that would adversely affect the pharmacist-patient-practitioner relationship. A proposal to amend Rule 14 is under consideration by the Board. See Part IV infra.

8. Rule 26, as then in effect, prohibited pharamcies in most cases from collecting or dispensing prescriptions in batches at drop-off locations. Rule 26 was superseded on November 4, 1986. See Part IV, infra.

9. In other provisions of chapter 112 of the General Laws, the Legislature has explicitly prohibited claims of professional superiority in advertising, and with respect to the regulation of

podiatrists has defined such advertising to constitute "unprofessional conduct." G.L. c. 112, § 19. See G.L. c. 112, § 52A (prohibiting dentists from claiming professional superiority). Therefore, in generally authorizing the Pharmacy State Board to promulgate rules of professional conduct, the Legislature intended the State Board to promulgate a rule like Rule 7, if it saw fit.

10. Pursuant to G.L. C. 112, § 30, only registered pharmacists, persons acting under their direction and supervision, and practitioners within the meaning of G.L. c. 94C may dispense controlled substances. Pursuant to G.L. c. 94C, § 3, all prescription drugs are controlled substances. Pursuant to G.L. c. 94C, § 1, "dispense" means "to deliver a controlled substance to an ultimate user . . . or to the agent of an ultimater

user . . . ." Therefore, in authorizing the State Board to regulate distribution, dispensing, and possession of controlled substances in the commonwealth, the Legislature clearly authorized the promulgation of Rule 14, prohibiting mail order pharmacy.

11. Pursuant to G.L. c. 112, § 30, a pharmacist may only dispense controlled substances when acting in the course of his employment in a pharmacy. Pursuant to G.L. c. 94C, § 1, and G.L. c. 112, § 39, a pharmacy is a facility licnsed to dispense controlled substances, and under the direction or supervision of a registered pharmacist. Pursuant to G.L. c. 94C, § 10, and G.L. c. 112, § 38, each store for the transaction of the retail drug business and each pharmacy must be separately licensed. Therefore, in

authorizing the State Board to regulate the distribution, dispensing, and possession of controlled substances, the Legislature clearly authorized the promulgation of Rule 26, prohibiting the conduct of pharmacy business in unlicensed drop-off centers not under the direction and supervision of a registered pharmacist.

III.

12. The petitioner is constituted by 15 U.S.C. § 41, and is composed of five commissioners appointed by the President for seven-year terms, and removable only for inefficiency, neglect of duty, or malfeasance in office. The petitioner thus is substantially free from the direction and control of the President, and so is not properly characterized as an agency within the Executive.

13. The Constitution of the United States expressly vests the power and responsibility to "take Care that the Laws be faithfully executed" in the President and no other person, body, or branch of the federal government. Furthermore, the Constitution forbids the combination of legislative, executive, and judicial powers, but requires a separation of such powers. The Constitution does not permit or empower the Congress to grant power to execute or enforce the laws of the United States to any person, body or agency not subject to the ongoing supervision and control of the President.

14. In initiating the investigation of the State Board's regulations preparatory to an action to enforce the antitrust or unfair competition laws of the United States, the Commission has exer-

cised and is purporting to exercise executive powers in violation of the express terms of the United States Constitution, and of the principle of the separation of powers implicit therein.

IV.

15. The Pharmacy Board in December, 1985, declined to cooperate further with the petitioner as the result of the position taken by the petitioner in reference to its sister state agency the Optometry Board. As is detailed in the Affidavit of Thomas Barnico, filed herewith, in the course of the petitioner's investigation of regulations of the Massachusetts State Board of Registration in Optometry, that State Board repealed three of four regulations deemed objectionable by the petitioner, upon the recommendation of

state officials. Even so, the petitioner insisted upon a full evidentiary hearing and an order purporting to enjoin enforcement of the repealed regulations, to require the State Board to advise registrants of the order, and to file regular reports with the petitioner concerning the State Board's performance of its duties. The petitioner argued that since the Optometry regulations were repealed during the pendency of the investigation, the Optometry Board could not be trusted not to repromulgate them absent an order.

16. At no time in the course of its investigation has the petitioner proposed to the Pharmacy Board that it amend its regulations, as the petitioner may do pursuant to G.L. c. 30A, § 4. In September, 1986, in response to a proposal by

the Secretary of the Commonwealth's Executive Office of Consumer Affairs, the State Board proposed amendments to two of the three regulations under investigation. The amendments were adopted on November 4, 1986, after hearing pursuant to G.L. c. 30A, § 2.

17. Further, in response to additional comments by the Secretary, the State Board took under advisement a proposal to change the third regulation under investigation by the petitioner. These matters are detailed in an Affidavit of Charles Monahan filed herewith. The respondents have kept the petitioner fully advised with respect to these events by letter, see Attachments 1 and 2, and by telephone.

18. It appears that the petitioner, which was created in 1914, did not assert

authority to determine the lawfulness of actions of state regulatory agencies until 1984. The Commission has never issued a formal ruling on the question of its authority to investigate and bring enforcement proceedings against such agencies notwithstanding state action immunity.

19. Nevertheless, it appears from the rulings in the Optometry Board case and in this case, that the Commission has finally concluded that it has authority to investigate and enter orders at least against state regulatory boards consisting of members of the regulated group:

a. In the Optometry Board's case, the Board raised the state action defense in a motion to dismiss. The administrative law judge denied the motion on the merits without a hearing, and denied

certification of the question to the full Commission after Complaint Counsel argued that "differences of opinion as to these issues do not appear to exist at the Commission level." The administrative law judge also denied an interlocutory appeal of the question because, he ruled, it "failed to show substantial ground for difference of opinion on the merits of the motion for dismissal." Affidavit of Assistant Attorney General Thomas Barnico ¶ 15 at 4.

b. The respondents likewise timely raised the state action defense in their Petition to Quash Subpoenas, Exhibit E to the petition. Although the respondents set forth in detail their statutory authority, a single commissioner (Terry Calvani) ruled that the State Board had failed to carry what he ruled was its

burden, i.e., to show "that the Commonwealth 'clearly intends to displace competition in a particular field with a regulatory structure . . .'" Order denying Petition to Quash at 2 (July 15, 1986), Exhibit F to Petition for Enforcement.

c. Pursuant to Rule 2.7(f) of the Commission's rules, the respondents sought the review of the full Commission. The respondents set forth in detail their authority under state law to promulgate and enforce the subject regulations, pointed out that the state action immunity is an immunity from federal antitrust scrutiny, and not just immunity from judgments or orders under the antitrust laws, and in the interests of comity requested plenary Commission review of the state action defense (and the separation of powers question) in advance of the

intrusive and burdensome process followed in the Optometry Board's case. In the alternative, if the full Commission was disinclined to decide the question in advance, the respondents requested that the Commission at least stay proceedings pending a final decision on the state action defense of the respondents' sister state agency. Request for Review (July 18, 1986), Exhibit G to Petition for Enforcement.

d. On June 30, 1986, the full Commission denied the Request for Review because, it ruled, the Request "does not raise any new or different issues regarding the requested quashing of the subpoenas, and . . . the petition was properly denied for the reasons stated in the July 15, 1986 letter ruling." Order denying Request for Review (July 30,

1986), Exhibit I to Petition for Enforcement.

20. The arguments presented by the respondents are purely arguments of law, as there is no factual dispute concerning the status of the State Board as an agency of the Commonwealth, or concerning the nature or scope of the State Board's authority. If the Court declines to review the respondents' arguments now, they will be subjected to substantial, burdensome and oppressive discovery and trial, as demonstrated by the Optometry Board case. The petitioner has not shown that the public interest requires that the investigation move forward immediately, even before decision of the Optometry Board's case. Any exigency that may have existed has been alleviated by the amendments of the Pharmacy Board's regulations.

In consideration of the foregoing, the respondents respectfully request that the Court deny enforcement of the subpoenas at least until the final disposition of the petitioner's proceedings (including any appeal thereof) against the State Board of Registration in Optometry.

In support of their position, respondents refer the Court to their memorandum filed herewith.

By their attorneys,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

/s/

William L. Pardee
Assistant Attorney General
Government Bureau
One Ashburton Place, Room 2019
Boston, Massachusetts 02108-1698
(617) 727-1039

Date: November 19, 1986

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FEDERAL TRADE COMMISSION, Plaintiff, v. CHARLES F. MONAHAN, et al., Defendants.	)	MBD No. 86-848-Y

AFFIDAVIT OF THOMAS A. BARNICO

I, Thomas A. Barnico, Assistant Attorney General of Massachusetts, under oath depose as follows.

1. I am counsel of record for the Massachusetts Board of Registration in Optometry (the optometry board) in an adjudicatory proceeding pending before the Federal Trade Commission, In the Matter of Massachusetts Board of Registration in Optometry, FTC Docket No. 9195.

2. The optometry board exists and transacts public business under Massachusetts General Laws (G.L.) c. 13, § 16, and c. 112, §§ 66-73B. Massachusetts law requires that the Governor appoint practicing optometrists to four of the five seats on the optometry board. G.L. c. 13, § 16.

3. The July 7, 1985, complaint in FTC Docket No. 9195 challenged certain past and current regulations of the board concerning advertising by optometrists. Ex. "A" attached.

4. On July 31, 1985, I met with counsel for the FTC and suggested that in light of rulemaking proceedings pending before the board which would eliminate three of the four regulations challenged in the complaint, the FTC's action should be dismissed as to those regulations, or at least discovery stayed. I

was told by FTC complaint counsel that the prospective repeal of the three board regulations would be "irrelevant" to pursuit of FTC's case against the otpometry board.

5. On September 11, 1985, the board moved to stay the FTC proceedings pending board action on proposed regulations which would repeal three of the four regulations challenged in the complaint.

6. On September 13, 1985, FTC complaint counsel argued that "the Commission intended that this litigation move forward even though the Board may have begun to take some steps to eliminate anticompetitive restrictions." Opposition to Respondent's Motion to Stay Discovery at 2 (September 13, 1985).

7. On September 17, 1985, the FTC Administrative Law Judge (ALJ) denied the optometry board's motion to stay proceedings.

8. On October 31, 1985, the optometry board moved to dismiss the complaint on the ground that its regulations and enforcement actions were "state action" and therefore exempt from the FTC Act.

9. FTC complaint counsel opposed, and the ALJ denied, the optometry board's request for oral argument on the questions presented by the motion.

10. On November 7, 1985, the optometry board repealed three of the four regulations challenged in the complaint. Ex. B.

11. On November 8, 1985, FTC complaint counsel opposed the board's request for certification of the "state

action" question to the Commission on the ground that "differences of opinion as to these issues do not appear to exist at the Commission level."

12. On November 19, 1985, the ALJ denied the board's motion to dismiss.

13. Also on November 19, 1985, the ALJ denied, without explanation, the optometry board's request that its motion to dismiss be certified to the Commission and further proceedings stayed.

14. On December 2, 1985, the optometry board moved for an interlocutory appeal to the Commission and a stay of proceddings on the ground that its motion to dismiss presented "a controlling question of law as to the jurisdiction of the Federal Trade Commission over sovereign states and their agencies."

15. On December 4, 1985, the ALJ denied the optometry board's motion for an interlocutory appeal because it had "failed to show substantial ground for difference of opinion on the merits of the motion for dismissal." As authority for that ruling the ALJ cited a similar order by an ALJ denying an interlocutory appeal in Rhode Island Board of Accountancy in FTC Docket No. 9181. The Rhode Island case ended in a consent judgment.

16. The discovery which followed the denial of the optometry board's motion to dismiss included the oral deposition of six current and former board members and three board investigators.

17. During the depositions of current and former Board members, FTC complaint counsel asked numerous questions

probing the mental processes of the members, including questions which sought explanations of the reasons for the promulgation of the regulations, and questions seeking the opinions of the members with regard to optometric advertising, professional ethics, competition and the public interest.

18. A ten-day trial before the ALJ took place in February, 1986.

19. In June, 1986, the ALJ issued his decision. The decision held that the optometry board's past and current regulations and related enforcement efforts constituted "unreasonable restraints of trade" which violated the Sherman and Federal Trade Commission Acts. A copy of the ALJ's decision appears as "Attachment 1" to the Commission's Petition in this Court.

20. On July 10, 1986, the optometry board appealed the decision of the ALJ to the Commission. Oral argument on the optometry board's appeal is scheduled for December 2, 1986.

21. The questions presented in the Board of Optometry's appeal are as follows:

(1) Whether state regulations and enforcement actions can "violate" the FTC Act absent a showing that the antitrust laws preempt those actions;

(2) whether the regulations and enforcement actions of a regulatory agency of state government can be and were correctly held to be the product of a "combination or conspiracy" proscribed by the Sherman and FTC Acts;

(3) whether the regulations and enforcement actions of a regulatory agency of state government are "state action" and therefore immune from the antitrust laws;

(4) whether the repeal of state regulations which has the effect of changing state law moots all of complaint counsel's claims and requests for relief based thereon;

(5) if the regulations of a state agency are conceded not to be preempted by the FTC Act, what showing must the state agency make under the Act to uphold the reasonableness of its regulations and related enforcement activity?

(6) whether the enforcement of regulations of a state agency were properly enjoined under the antitrust rule of reason on the ground that they are an overbroad suppression of commercial speech.

Signed under the pains and penalties of perjury, this 18th day of November, 1986.

/s/
Thomas A. Barnico
Assistant Attorney General

/s/
Cathryn Ann Riley
NOTARY PUBLIC

My commission expires:
5/30/91

Dated: November 18, 1986

[Exhibits to the Affidavit Omitted]

§ 1. Trusts, etc., in restraint of trade ilegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one millior dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 45. Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(2) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 . . ., and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7

U.S.C. § 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. § 227(a)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

* * *

(b) Proceeding by Commission; modifying and setting aside orders

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partner-

ship, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the of-

fice of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United

States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty

days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of

the Commission in response to a request made by a person, partnership, or corporation under paragraph (2) not later than 120 days after the date of the filing of such request.

* * *

§ 46. Additional powers of Commission

The Commission shall also have power --

(a) Investigation of persons, partnerships, or corporations

To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan

institutions described in section 57a(f)(3) of this title, and common carriers subject to the Act to regulate commerce, and its relation to other persons, partnerships, and corporations.

§ 49. Documentary evidence; depositions; witnesses

For the purposes of sections 41 to 46 and 47 to 58 of this title the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter

under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a

subpoenas issued to any person, partnership, or corporation issue an order requiring such person, partnership, or corporation to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the Commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person, partnership, or corporation to comply with the provisions of sections 41 to 46 and 47 to 58 of this title or any order of the Commission made in pursuance thereof.

The Commission may order testimony to be taken by deposition in any proceeding or investigation pending under said sections at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the Commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in

the courts of the United States and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

MASSACHUSETTS GENERAL LAWS

Mass. Gen. Laws ch. 13, § 22. Board of Registration in Pharmacy; Appointment, etc.

There shall be a board of registration in pharmacy, in the three following sections called the board, consisting of seven persons, who shall be residents of the commonweath. Five of these persons shall be registered pharmacists and shall have had at least ten consecutive years of practical experience in the compounding and dispensing of physicians' prescriptions, and shall actually be engaged in the drug business. At the time of appointment to the board, one, but not more than one of said five persons shall be in the employ of a retail drug organization operating ten or more registered retail drug stores under the provisions of section thirty-nine of chapter one

hundred and twelve. One person shall be a registered pharmcist and shall have had at least ten years of experience in the compounding and dispensing of physicians' prescriptions, and shall actually be engaged as a pharmacist in a public, non-profit hospital in the commonwealth. One member shall be a representative of the public, subject to the provisions of section nine B. No more than one member shall reside in the same senatorial district. One member shall annually in November be appointed by the governor, for five years from December first following.

Mass. Gen. Laws ch. 94C

§ 1. Definitions.

* * *

"Administer", the direct application of a controlled substance whether by

injection, inhalation, ingestion, or any other means to the body of a patient or research subject by--

(a) A practitioner, or

(b) a nurse at the direction of a practitioner in the course of his professional practice, or

(c) an ultimate user or research subject at the direction of a practitioner in the course of his professional practice.

* * *

"Controlled substance", a drug, substance, or immediate precursor in any schedule or class referred to in this chapter.

* * *

"Dispense", to deliver a controlled substance to an ultimate user or research subject or to the agent of an ultimate user or research subject by a practi-

tioner or pursuant to the order of a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary for such delivery.

"Distribute", to deliver other than by administering or dispensing a controlled substance.

* * *

"Pharmacist", any pharmacist registered in the commonwealth to dispense controlled substances, and including any other person authorized to dispense controlled substances under the supervision of a pharmacist registered in the commonwealth.

"Pharmacy", a facility under the direction or supervision of a registered pharmacist which is authorized to dispense controlled substances, including

but not limited to "retail drug business" as defined below.

* * *

§ 6. Rules and Regulations.

The board of registration in pharmacy in the case of a retail drug business or wholesale druggist and the commissioner in all other cases may promulgate rules and regulations relative to registration and control of the manufacture, distribution, dispensing and possession of controlled substances within the commonwealth.

* * *

§ 10. Separate Registration Required for Each Principal Place of Business or Practice, etc.

A separate registration shall be required at each principal place of business or professional practice where the

registrant manufactures, distributes, or dispenses controlled substances.

§ 11. Inspection.

The board of registration in pharmacy in the case of a pharmacy and the commissioner in any case may inspect in accordance with his or its rules and regulations the establishment of a registrant or applicant for registration pursuant to the provisions of this chapter.

§ 12. Issuance of Registration; Determination of Public Interest.

(a) The board of registration in pharmacy in the case of a retail drug business or wholesale druggist and the commissioner in all other cases shall register an applicant to manufacture or distribute controlled substances included

in the schedules established pursuant to section two unless he determines that the issuance of that registration would be inconsistent with the public interest. In determining the public interest, the board of registration in pharmacy in the case of a retail drug store or a wholesale druggist and the commissioner in all other caes shall consider the following factors:

(1) maintenance of effective controls against diversion of controlled substances into other than legitimate medical, scientific, or industrial channels;

(2) compliance with applicable federal, state and local law;

(3) any conviction of the applicant under any federal and state law relating to any controlled substance;

(4) past experience in the manufacture or distribution of controlled substances, and the existence in the applicant's establishment of effective controls against diversion;

(5) furnishing by the applicant of false or fraudulent material in any application filed under the provisions of this chapter;

(6) suspension or revocation of the applicant's federal registration to manufacture, distribute or dispense controlled substances as authorized by federal law; and

(7) any other factors relevant to and consistent with the public health and safety.

(b) Registration under subsection (a) of this section shall not entitled a registrant to manufacture or distribute controlled substances in Schedules I or

II established pursuant to the provisions of section two except to the extent specified in the registration.

§ 13. Revocation and Suspension of Registration; Grounds, etc.

(a) The board of registration in pharmacy in the case of a retail drug business or wholesale druggist and the commissioner in all other cases may suspend or revoke a registration to manufacture, distribute, dispense or possess a controlled substance, after a hearing pursuant to the provisions of chapter thirty A upon a finding that the registrant:

(1) has furnished false or fraudulent material information in any application filed under the provisions of this chapter;

(2) has been convicted under any state or federal law of any criminal violation relating to his fitness to be registered under this chapter;

(3) has had his federal registration suspended or revoked to manufacture, distribute, dispense, administer or possess controlled substances; or

(4) is, upon good cause, found to be unfit or unqualified to manufacture, distribute, dispense, or possess any controlled substance.

(b) The board of registration in pharmacy in the case of a retail drug business or wholesale druggist and the commissioner in all other cases may pursuant to the provisions of this section or section fourteen suspend or revoke any registration issued by him or it for violation of any provision of this chapter.

(c) Whenever the commissioner, the board of registration in pharmacy, or the commissioner of mental health has substantial reason to believe that a registrant has committed a criminal violation of any provision of this chapter, he or it shall promptly report all pertinent facts to the district attorney in the county where the violation is believed to have occurred, or to the attorney general.

(d) The board of registration in pharmacy in the case of a retail drug business or wholesale druggist and the commissioner in all other cases may limit revocation or suspension of a registration to the particular controlled substance with respect to which grounds for revocation or suspension exists.

(e) If the board of registration in pharmacy in the case of a retail drug business or wholesale druggist or the commissioner in all other cases suspends or revokes a registration, all controlled substances which are affected by such suspension or revocation order at the time of suspension or the effective date of the revocation order shall be placed under embargo pursuant to the procedures prescribed in sections one hundred and eighty-nine and one hundred and eighty-nine A of chapter ninety-four. No disposition may be made of substances under such embargo until the time for taking an appeal has elapsed or until all appeals have been concluded unless a court, upon application therefor, orders the sale of perishable substances and the deposit of the proceeds of the sale with the court. Upon a revocation order be-

coming final, all controlled substances may be forfeited to the commonwealth under the provisions of section forty-seven.

(f) The board of registration in pharmacy in the case of a retail drug business or wholesale druggist and the commissioner in all other cases shall promptly notify the bureau of all orders suspending or revoking a registration and all forfeitures of controlled substances.

§ 14. Suspension or Refusal to Renew upon Finding of Imminent Danger to Public Health, etc; Duration.

The board of registration in pharmacy in the case of a retail drug business or wholesale druggist or the commissioner in all other cases may without hearing suspend or refuse to renew any registration if he finds that there is an immi-

nent danger to the public health or safety which warrants this action, provided he promptly affords the registrant an opportunity for a hearing under chapter thirty A. The suspension shall continue in effect until the conclusion of the proceedings including judicial review thereof, unless sooner dissolved by a court of competent jurisdiction, or withdrawn by the board of registration in pharmacy in the case of a retail drug business or wholesale druggist, or withdrawn by the commissioner in any other case.

Mass. Gen. Laws ch. 112

§ 19. "Unprofessional Conduct" Defined.

"Unprofessional conduct", as used in section eighteen, shall include: . . . (d) written or printed statements of a

character tending to claim professional superiority or the performance of professional services in a superior manner; (e) the inclusion of any fraudulent, misleading or deceptive statement in any form of advertising; . . .

§ 24. Examination of Pharmacists for Registration; Certificates; Reciprocity.

A person who desires to do business as a pharmacist shall, upon payment of a fee, as determined annually by the commissioner of administration under the provision of section three B of chapter seven, to the board of registration in pharmacy, herein and in sections twenty-five to forty-two, inclusive, called the board, be entitled to examination; provided, that he shall have been graduated from a school or college of pharmacy ap-

proved by the board. If any such person is found qualified on examination, he shall be registered as a pharmacist, and shall receive a certificate signed by the president and secretary of the board. . . .

§ 27. Hearing on Application and Complaints.

The board shall hear all complaints made to it against any person registered as a pharmacist charging him in his business as a pharmacist with violating any of the rules or regulations of the board or any laws of the commonwealth, and especially the laws relating to the sale of alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, and alcohol; or with engaging with, or aiding or abetting another

in the violation of said rules, regulations or laws; or, if he himself is not the owner and actively engaged in such business, with suffering or permitting the use of his name or certificate of registration by others in the conduct of the business of pharmacy. Such complaints shall set out the offence alleged, and be made within six months after the date of the act complained of or within six months after a conviction by a court of competent jurisdiction. The board shall notify the person complained against of the charge against him and of the time and place of the hearing at which he may appear with his witnesses and be heard by counsel. It may summon witnesses and compel their attendance at said hearings. Witnesses shall testify on oath and may be sworn by a member of the board. Three members

of the board shall be a quorum for any such hearing.

§ 28. Effect of Decision.

If the full board sitting at such hearing finds the person guilty, the board may suspend the effect of his certificate of registration as a pharmacist for such term as it fixes. The board may at any time reconsider its action in cases where it has suspended or revoked the license or certificate of registration of a pharmacist, and may change its determination as justice shall require.

§ 29. Suspension.

It may, by a majority vote of all its members, after hearing, suspend the certificate of registration of a registered pharmacist, who, in its judgment,

is a menace to the public by reason of the improper use of intoxicating liquor or drugs.

§ 30. Persons Authorized to Dispense Controlled Substances; Penalty for Violators.

No person shall dispense any controlled substance or any substance intended for hypodermic use except a person registered as a pharmacist or assistant pharmacist under section twenty-four or corresponding provisions of earlier laws who is acting in the course of his employment in a pharmacy, an intern in pharmacy under the direct supervision of a registered pharmacist in accordance with the regulations of the board, and a practitioner in accordance with the provisions of chapter ninety-four C. The terms "controlled substances", "dispense", "practitioner", and "pharmacy",

as used in this section, shall have the same meaning as set forth in section one of said chapter ninety-four C.

Whoever violates any provision of this section shall be punished by imprisonment in a jail or the house of correction for not more than three months, or by a fine of not more than five hundred dollars, or both.

Notwithstanding any provision of this section to the contrary, a person under the direction and supervision of a registered pharmacist may perform those clerical and ministerial supportive services in a pharmacy which do not require the exercise of professional judgment by a registered pharmacist. The board may make such rules and regulations as it deems necessary to define the supportive services which an unregistered person may

perform in a pharmacy. The registered pharmacist shall be responsible for the actions of any supportive personnel under his supervision.

§ 38. Transaction of Retail Drug Business Regulated.

No store shall be kept open for the transaction of the retail drug business, or be advertised or represented as transacting such business, by means of any sign or advertisement containing the words "drug store", "pharmacy", "apothecary", "drug", "drugs", "medicine shop", or any combination of such words, or otherwise, unless it is registered with, and a permit therefor has been issued by, the board as provided in the following section; . . .

§ 39. Registration, Permits, Fees, etc.

The board may, upon application made in such manner and form as it shall determine, register a store for the transaction of the retail drug business, which store shall be independent of and separate from any business or store other than a retail drug store and issue to such person as it deems qualified to conduct such store, a permit to keep it open; provided, however, that the board may deny such registration and refuse to issue such permit if, in its discretion, such store would be inconsistent with or opposed to the best interests of the public health, welfare or safety, but no such registration shall be made or permit issued in the case of a corporation unless it shall appear to the satisfaction of the board that the management of such

drug store or pharmacy is in the hands of a registered pharmacist. . . .

§ 40. Registration and Permit May be Suspended or Revoked, etc.

The board may suspend or revoke any registration made under section thirty-nine or thirty-nine A and any permit issued thereunder for any violation of the law pertaining to the drug business or the sale of alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, or for any violation of the rules and regulations established by the board, or for aiding or abetting in a violation of any such law, rules or regulations; but before such suspension or revocation the board shall give a hearing to the holder of the permit, after due notice to him of the charges against him and of the time

and place of the hearing. Such holder may appear at the hearing with witnesses and be heard by counsel. Witnesses shall testify on oath and any member of the board may administer oaths to them. The board may require the attendance of persons and compel the production of books and documents. Three members of the board shall be a quorum for such a hearing, but no registration or permit shall be suspended or revoked unless upon the affirmative vote of three or more members thereof.

§ 42A. Rules and Regulations; Revocation or Suspension of License, etc.; Hearings; Rules, etc., to Form Part of Application for License, etc.

The board may make such rules and regulations as it deems necessary to enable it to properly enforce the provi-

sions of law relating to the retail drug business and pharmacy, and regarding any other matter within its jurisdiction; provided, that nothing herein shall authorize the board to make a rule or regulation requiring, as a prerequisite to the examination of an applicant under section twenty-four, or to his qualification, that he be the holder of a degree, nor a rule or regulation prohibiting a registered pharmacist connected with and employed by a hospital or clinic from dispensing medicines or drugs to an employee of such hospital or clinic for the use of such employee, his spouse and his children living in the same household with such employee.

The board may by rule or regulation adopt, amend or repeal rules of professional conduct. Every person who holds

a certificate, license, registration or permit to practice pharmacy or engage in the retail drug business in this commonwealth shall be governed and controlled by the rules and regulations of professional conduct adopted by the board. The board may suspend or revoke any certificate, license, registration or permit to practice pharmacy or engage in the retail drug business for any violation of the rules and regulations established hereunder or for aiding or abetting in any violation of such rules or regulations; but before such suspension or revocation, the board shall give a hearing to the holder of the certificate, license, registration or permit, after due notice to him of the charges against him and of the time and place of the hearing. Such holder may appear at the

hearing with witnesses and be heard by counsel. Witnesses shall testify on oath and any member of the board may administer oaths to them. The board may require the attendance of persons and compel the production of books and documents. Three members of the board shall be a quorum for such a hearing, but no certificate, license, registration or permit shall be suspended or revoked unless upon the affirmative vote of three or more members thereof. The rules of professional conduct adopted by the board shall be printed as part of the application blank for permits, licenses, cetificates and registration and for renewals thereof, and every applicant shall subscribe thereto when making an application.

§ 52A. Illegal Advertising.

No registered dentist, person practicing dentristry, or dental hygienist shall include, or permit, or cause to be included, in any newspaper, radio, or television advertisement, or in any display, sign, personal solicitation or other manner or advertising, any written or spoken words or statements of a character tending to deceive or mislead the public, or claiming professional superiority or the performance of professional services in a superior manner, or the performance of painless operations of a dental or oral surgical nature, or shall advertise with signs or printed advertisements, or by means of show cases, containing the representation of a tooth, teeth, dental restoration of any kind or of whatsoever design or description or

any portion of the human head or neck or photograph of any person, or shall make or set forth any promises, guarantees, representations, or statements that satisfaction or a cure will result from the performance of professional services; provided, however, that the foregoing shall not be construed to prevent the publication of truthful advertisements concerning the availability and price of routine dental services by persons subject to this section. . . .

§ 61. Boards of Registration in Medicine, etc., May Suspend, etc., Certificates, etc.

Except as otherwise provided by law, each board of registration or examination in the division of registration of the department of civil service and registration, after a hearing, may, by a majority

vote of the whole board, suspend, revoke or cancel any certificate, registration, license or authority issued by it, if it appears to the board that the holder of such certificate, registration, license or authority, is insane, or is guilty of deceit, malpractice, gross misconduct in the practice of his profession, or of any offence against the laws of the commonwealth relating thereto. Any person whose certificate, registration, license or authority is suspended or revoked hereunder shall also be liable to such other punishment as may be provided by law. The said boards may make such rules and regulations as they deem proper for the filing of charges and the conduct of hearings.

Each such board, if it appears after a hearing that a statement in an applica-

tion to it for certification, registration, licensure or authority, which is required to be under oath or affirmation or to contain or be verified by a written declaration that it is made under penalties of perjury, is false and known to the applicant to be false, shall refuse to grant or issue or shall revoke or cancel such certificate, registration, license or authority. The provisions of this paragraph shall not affect, but shall be in addition to, any other penalty provided by law.

Except as otherwise provided in this chapter, no such board shall make any rule or regulation prohibiting the advertising or dissemination of truthful information concerning the price, nature and availability of goods and services to consumers, the effect of which would restrain trade or lessen competition.

§ 64. Review of Suspension, etc., of Certificate, etc., by Supreme Judicial Court.

The supreme judicial court, upon petition of a person whose certificate, registration, license or authority has been suspended, revoked or cancelled, may enter a decree revising or reversing the decision of the board, in accordance with the standards for review provided in paragraph (8) of section fourteen of chapter thirty A; but prior to the entry of such decree no order shall be made or entered by the court to stay or supersede any suspension, revocation or cancellation of any such certificate, registration, license or authority.

Supreme Court, U.S.
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CLERK

(3)

No. 87-1015

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES F. MONAHAN, et al.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the First Circuit

BRIEF FOR AMICI CURIAE

Alabama, Arizona, Delaware, Hawaii, Idaho, Illinois, Kansas, Louisiana, Michigan, Mississippi, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Tennessee, West Virginia, Commonwealth of the Northern Mariana Islands

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INTEREST OF AMICI CURIAE

The states listed above submit this brief amici curiae in support of the

petition for a writ of certiorari to the United States Court of Appeals for the First Circuit. The interests of the amici relevant to the case are legal, institutional, and financial.

The states have an important legal interest in the clarification of the scope of state immunity from the antitrust laws. The decision of the court of appeals improperly narrows the immunity intended by Congress. Plenary review in this case will clarify the authority of state regulatory agencies to exercise traditional police powers free from antitrust investigation and litigation.

The petition also implicates the states' interests in effective economic regulation. The stated purpose of the FTC's investigation of the states is to determine whether state agencies are en-

gaging in "unfair methods of competition by promulgating and enforcing regulations to restrict competition." Pet. App. A44-45, A63-64. The FTC's attempt to review the justifications for and reasonableness of the states' regulatory programs, and in so doing to probe the involvement and intent of state officials in developing, promulgating and enforcing regulations, directly burdens state economic regulation. As governments exercising traditional regulatory powers to protect the public health and safety, the states are uniquely qualified to testify to the importance of the question presented by the petition in this case.

Finally, the states have an important financial interest in the question presented by the petition. The legal defense of FTC investigations and litiga-

tion against the states is an expensive and time-consuming effort. Since the states have borne and will bear the fiscal burdens of the FTC's enforcement actions, they are well qualified to convey the national importance of this case to the Court.

REASONS FOR GRANTING THE WRIT

The amici support the petitioners in their statement of the reasons for granting review of this case. To those reasons amici add a brief statement of the following two points: (1) the national scope of the FTC effort, and (2) the degree of intrusion into state affairs worked by FTC enforcement of the antitrust laws against the states.

1. Each of the amici states have regulatory agencies identical or sub-

stantially similar to the Massachusetts State Pharmacy Board. In each state, agencies exercise powers of economic regulation delegated by their state legislature to protect the public health and safety. In each state, while the legislature provides guidance in the relevant statutory grant of authority, the legislature has delegated broad powers to the agencies to promulgate substantive rules governing business and professional conduct. Thus the regulatory action of Massachusetts challenged by the FTC in this case is similar to a substantial number of regulatory programs in the amici states.

The FTC investigation challenged in this case is likewise national in scope. As the petition demonstrates, a substantial number of states have already come under FTC scrutiny. Pet. 20-22 n. 9.

For example, FTC has subpoenaed current and former members and staff of the Michigan and Colorado Boards of Pharmacy to testify in connection with the FTC's investigations of regulations of those Boards. The Colorado Attorney General unsuccessfully sought to have the FTC quash subpoenas issued to the Colorado Board of Pharmacy, and that Board later revised certain of its regulations governing pharmacy in that state. The investigation of the Michigan Board is pending.

In some cases the Commission has issued complaints and entered consent orders. See, e.g., In re Rhode Island Board of Accountancy, FTC Docket No. 9181, 50 Fed. Reg. 49064 (November 29, 1985); In re Wyoming State Board of Registration of Chiropractors, FTC File No. 861-0019, FTC Docket No. C-3176, 51 Fed.

Reg. 6106 (February 20, 1986); In re Montana Board of Optometrists, FTC Docket No. C-3161, 50 Fed. Reg. 24203 (June 10, 1985); In re Louisiana State Board of Dentistry, FTC Docket No. 9188.

An investigation by the FTC entails significant costs even at the initial, informal stage. The licensing agencies of the amici states have small budgets and few or no staff to spare for the burdensome discovery demanded by the FTC. If the FTC determines to begin formal proceedings, as the petition shows, the burdens and cost of defending are multiplied. Pet. App. A90 (Barnico Affidavit). Because of these burdens, in many cases, the threat of FTC litigation has prompted state agencies to change state regulations despite their conviction that the regulations promoted sound regulatory policies.

For example, the FTC has commenced investigations of the regulations of several Oregon agencies. Because those agencies must pay the cost of representation out of their budgets, at least one agency has chosen to repeal questioned regulations rather than commit a substantial portion of its annual budget (as well as the time of its staff) to legal defense. Likewise, in Oklahoma the threat of an FTC investigation, and the implicit threat of personal liability, has caused several agencies to abandon regulations rather than incur the risk and burdens of defending them. Similar examples abound throughout the amici states.

2. In addition to its national impact, the petition also presents a question of national importance. As the petition demonstrates, the "effect of

the decision below is to trammel state regulatory authority without clear congressional warrant." Pet. 59.

The FTC's effort fundamentally misconceives the prerogatives of state agencies under the antitrust laws. The FTC would substitute its own regulatory judgment for that of state regulators who traditionally exercise police powers to protect the public health and safety. The FTC's position also obviates the internal corrective processes of the States. In many of the amici states, the Attorney General or another state agency has advocated changes in regulations which they believe to be unduly restrictive of competition. Furthermore, in each of the amici states, persons affected by business regulations are free to test the lawfulness of the regulations

under state law. The FTC's position undermines these processes by using the antitrust laws to challenge collaterally not only the lawfulness, but also the reasonableness of state regulatory measures.

The wisdom of particular regulations is not the issue presented by the petition. The petition argues that the antitrust laws were never intended to mediate the inevitable disagreements between federal and state governments as to the reasonableness of particular economic regulation. Rather, in enacting the antitrust laws, Congress chose to leave the states free to enact their own regulatory programs, even though they might appear to conflict with the policies embodied in the antitrust laws. Because the FTC would reverse this choice, and

would substitute its own policy for the diverse policies of the states, the petition is worthy of review by the Court.

CONCLUSION

For the reasons set forth above, the Court should grant the writ of certiorari, and should review and reverse the judgment of the court of appeals.

Respectfully submitted,

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No. 87-1015

In the Supreme Court of the United States

CHARLES F. MONAHAN, ET AL.,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR AMICUS CURIAE STATE OF MISSOURI

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BRIEF FOR AMICUS CURIAE STATE OF MISSOURI

INTEREST OF AMICUS CURIAE

The state of Missouri submits this brief *amicus curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit.

The state of Missouri, like the commonwealth of Massachusetts and the states appearing otherwise as *amici*, regulates a variety of professional occupations through administrative agencies. These agencies, much like the Massachusetts Pharmacy Board, are members of the executive branch of the state government acting in accordance with the legislative mandate to regulate the profession for the purpose of protecting the health, safety, and welfare of the citizens of the state of Missouri. The state of Missouri has a legitimate and valid interest in the present actions of the Federal Trade Commission regarding such regulatory agencies and shares with its fellow *amici* states the belief that the issue presented to this Court in the above-styled cause is one in need of resolution by this Court.

REASONS FOR GRANTING THE WRIT

The state of Missouri agrees with the position taken by petitioner in its brief and would further clarify the fundamental issues that underlie the need for this Court to grant certiorari in this matter.

The states are dealing with an intrusion into the fundamental concept of federalism. The Federal Trade Commission is asserting jurisdiction over the acts of state regulatory agencies for which it has no jurisdiction.

The applicability of the provisions of the Sherman Act to state governments, and hence the jurisdiction of the Federal Trade Commission as it relates to anticompetitive conduct of the states, was clearly enunciated in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed.

315 (1943). This Court, relying on principles of federalism and state sovereignty, refused to construe the Sherman Act as applying to anticompetitive conduct of states acting through their legislatures. Rather, this Court ruled that the Sherman Act was intended only to prohibit private restraints on trade and refused therefore to infer an intent to nullify a state's control over its officers and agents in activities directed by the legislature. As a general principle, therefore, no such jurisdiction has been or may be granted the Federal Trade Commission in such a case absent a specific showing of Congressional intent to do so. This "state action immunity" has, therefore, been accorded the acts of state legislatures and state Supreme Courts acting in a legislative capacity. *Hoover v. Ronwin,* 466 U.S. 558, 567-568, 104 S.Ct. 1989, 80 L.Ed. 2d 590 (1984).

This general principle has been refined, however, in order to deal with the anticompetitive acts of entities that were not clearly part of state government but yet were nonetheless asserting the same state action immunity. Tests were, therefore, devised by this Court for determining whether private entities could avail themselves of the state action immunity claim (i.e.: (1) that the entity acted pursuant to a clearly articulated and affirmatively expressed state policy and (2) that such activity was actively supervised by this state. See *City of Lafayette, Louisiana v. Louisiana Power & Light Company,* 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978)); and whether governmental entities that did not rise to the level of the state itself, such as municipalities, were likewise immune (i.e.: (1) that the actions were taken pursuant to a clearly articulated state policy to displace

competition with regulation. See *Town of Hallie v. City of Eau Claire,* 471 U.S. 34, 44, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985)).

The instant matter, however, entails activities engaged in by a state regulatory agency created pursuant to expressed statutory authority and acting in accordance with the intended legislative mandate. A state legislature evidences its intent to regulate a particular profession by, among other things, creating a regulatory agency and empowering that agency to make rules and regulations consistent with this legislative intent. All such licensing-related legislation is by its very nature inherently anticompetitive in that it at the very least places restraints on entry into the profession by limiting licensure to those individuals who meet the necessary requirements. Such action by the state legislature, although arguably anticompetitive in nature, would nonetheless fall within the state action immunity doctrine and would, therefore, not be subject to Federal Trade Commission review.

Such legislatures are not, however, by any stretch of the imagination, capable of anticipating the plethora of issues that arise in the day-to-day administration of such legislation. Legislatures, therefore, long ago recognized the need for the creation of agencies uniquely qualified by either experience or education to handle the duties associated with regulating the licensed profession, including the promulgation of regulations as necessary. These state regulatory agencies were created by legislatures for the express purpose of facilitating and implementing the regulatory goals of the legislation. It is here, however, that the Federal Trade Commission alleges

that the state sovereignty ends. A legislature may express an intent and purpose to engage in apparently anticompetitive activity without Federal Trade Commission interference. A state legislature that expresses such an intent and purpose and delegates the administration of such intent and purpose to a legislatively-created body existing within the executive branch of the state government has, however, according to the Federal Trade Commission, forfeited its sovereignty in this issue to the Federal Government.

That the concept of federalism stands or falls based on a legislature's inability to draft sufficiently narrow statutes so as to foresee every conceivable exigency that may arise in the regulation of a licensed profession and thereby forego the necessity of establishing state agencies to superintend the implementation of those statutes is ludicrous. Were this the case, the entire concept of delegation of legislative authority to administrative agencies would serve merely to toll the death knell of state sovereignty, for once the legislature delegates the regulation-making authority to the state agency, it would be deemed to have transferred jurisdiction of the agency's actions to the federal government. Certainly the concept of state sovereignty was never intended to be subject to so cavalier a treatment or to be dismissed so lightly as this.

Yet this is the position taken by the Federal Trade Commission. The FTC is more than willing to accord sovereignty to the acts of the state legislature alone, knowing full well that it is logistically impossible for any legislature to supervise a regulated profession itself on a daily basis. However, once this authority is dele-

gated to a state agency, the Federal Trade Commission then claims jurisdiction and authority to review and supervise the actions of that agency. Rather than coming within the state action immunity doctrine as rightly owed a sovereign state, the agency must now meet one or both of the above-cited tests to determine if its activities constitute state action. Such should not be the case.

This is the appropriate time to review this matter. Although the Federal Trade Commission has cited *Federal Trade Commission v. Texaco, Inc.*, 555 F.2d 862, 879 (D.C. Cir.) (en banc), *cert. denied* 431 U.S. 974 (1977) for the proposition that substantive defenses properly raised in an administrative proceeding are generally premature when raised in defense to compliance with a subpoena (see: Appendix to the Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit at A30-31), such a finding is not necessary here.

In the above-cited *Federal Trade Commission v. Texaco, Inc.*, case, the court set forth this previously-cited general rule and then stated the following:

> Moreover, in holding that an administrative subpoena must be enforced if the information is relevant to a lawful purpose of the agency, and not unduly indefinite or unreasonably burdensome, the Supreme Court has clearly rejected other defenses. The reasons for this rule are obvious. If parties under investigation could contest substantive issues in an enforcement proceeding, when the agency lacks the information to establish its case, administrative investigations would be foreclosed or at least substantially delayed.

(At 879.)

This is not the case here. The fundamental issue here is one of jurisdiction. Facts relating to that issue are not the subject of the subpoenas. The Federal Trade Commission does not lack "information to establish its case" on that issue, nor does the nonacquiescence of the state to these subpoenas "foreclose or at least substantially delay" the resolution of that issue.

As set forth in the above quote, subpoenas are to be enforced if they are "relevant to a lawful purpose." In that the Federal Trade Commission is acting beyond the scope of its authority, no lawful purpose is to be attained by requiring the enforcement of these subpoenas. The additional cost and burden of responding to such subpoenas placed on the petitioner, and on other states likewise dealing with the Federal Trade Commission, is in no one's best interest and may be avoided by a review of the petitioner's claim.

CONCLUSION

The matters concerning which the petitioner is requesting this Court to grant certiorari represent a fundamental challenge to the basic concept of federalism and state sovereignty by the Federal Trade Commission. For a federal agency to establish itself as the dispositive overseer of state regulatory actions is clearly beyond the intended purpose of its authority. The Federal Trade Commission has evidenced a determination to expand its scope of authority beyond permissible bounds and will continue according itself this expansive interpretation of its regulatory authority to the detriment of the states in particular and state sovereignty in general until this matter is finally resolved. The state of Missouri, therefore, requests that

this Court grant the petitioner's writ of certiorari in the above-styled case to effectuate the resolution of this question.

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FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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26 pp

QUESTION PRESENTED

Whether the state action doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), protects members and employees of a state self-regulatory board against being compelled to respond to testimonial subpoenas issued in connection with a federal antitrust investigation, on the theory that everything the board does is action of the sovereign state itself and therefore cannot violate the antitrust laws.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 832 F.2d 688. The district court's memorandum and order (Pet. App. A18-A26) is unofficially reported at 1987-1 Trade Cas. (CCH) ¶ 67,540. The letter rulings of a single member of the Federal Trade Commission (Pet. App. A27-A36) and the full Commission (Pet. App. A37-A38) denying petitions to quash investigative subpoenas are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A39) was entered on November 4, 1987. The petition for a writ of certiorari was filed on January 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are the seven members and the present and former executive secretaries of the Massachusetts Board of Registration in Pharmacy (Board). The Board is a self-regulatory agency of the Commonwealth of Massachusetts. Pet. App. A42-A43, A70. By statute, it consists of five retail pharmacists, a hospital pharmacist, and a public member, who are appointed to five-year terms by the Governor (Mass. Gen. Laws ch. 13, § 22 (1984); Pet. App. A114-A115). The Board has statutory authority to license and regulate pharmacists and to promulgate rules and regulations (Mass. Gen. Laws ch. 94C, § 6; *id.* ch. 112, §§ 24, 37, 40, 42A, 61; Pet. App. A118, A128-A129, A136-A140, A142-A144).

Three of the rules promulgated by the Board appear on their face to restrain competition among pharmacists in Massachusetts. One bans advertising claims of "professional superiority" (Mass. Regs. Code tit. 247, § 7.00(7) (1979 & Supp. 1987); Pet. App. A12, A14-A15). Another prohibits pharmacists from engaging in mail-order business (Mass. Regs. Code tit. 247, § 7.00(14); Pet. App. A12, A15). The third forbids the use of so-called "pick-up stations," which are arrangements involving "satellites" or "branch offices" of pharmacies at which prescriptions can be collected, delivered in batch to a pharmacy, and then returned to the branch offices to be picked up by patients (Mass. Regs. Code tit. 247, § 7.00(26); Pet. App. A13-A14, A16).

The Federal Trade Commission (FTC or Commission) is conducting investigations intended to identify possibly unlawful restraints on competition imposed by competitors serving on regulatory boards and to assess potential justifications for such restrictions. On November 4, 1985, the Commission formally authorized the use of com-

pulsory process "to determine whether unnamed state boards that regulate the pharmacy profession" were engaging in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, "by placing unreasonable restrictions on advertising or on business practices that offer increased convenience to consumers" (Pet. App. A63).[1] In May 1986, after the Board refused to allow FTC investigators to interview petitioners, FTC Commissioner Azcuenaga issued testimonial subpoenas to compel petitioners to appear for investigative hearings (Pet. App. A45-A46, A67, A70, A81).

On June 12, 1986, petitioners filed a petition asking the FTC to quash the subpoenas. Their primary assertion was that all actions of state boards are immunized from antitrust scrutiny by the "state action doctrine" of *Parker* v. *Brown*, 317 U.S. 341 (1943). Commissioner Calvani, acting pursuant to delegated authority, denied the petition in a letter ruling. He stated that substantive defenses to antitrust charges are generally premature when raised in response to investigative subpoenas. He also stated that existing precedents do not support the argument that the existence under state statutes of a power to issue regulations automatically confers total immunity from federal antitrust regulation. Pet. App. A27-A36. Petitioners then filed an appeal to the full Commission (C.A. App. 54-67). The Commission denied the appeal, adopted the letter ruling of Commissioner Calvani, and ordered compliance with the testimonial subpoenas (Pet. App. A37-A38).

After being notified that the witnesses would not appear, the FTC petitioned the district court under 15 U.S.C. 49 to order compliance with the subpoenas (Pet.

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[1] Conduct that violates the Sherman Act, 15 U.S.C. 1-7, also constitutes a violation of Section 5. *FTC* v. *Cement Institute*, 333 U.S. 683, 690-692 (1948).

App. A20-A21, A40-A50). The district court ordered compliance (*id.* at A18-A26), finding that the FTC was entitled to enforcement because its assertion of authority to investigate was not "plainly spurious." *Id.* at A23-A24 (citing *FTC* v. *Swanson,* 560 F.2d 1, 2 (1st Cir. 1977)). The district court rejected the contention that the state action doctrine immunizes all state entities from antitrust scrutiny, noting that similar contentions had been "expressly rejected" by this Court. *Id.* at A22 (citing *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389, 408 (1978)).

On appeal, petitioners questioned only the district court's resolution of the state action issue. The court of appeals affirmed (Pet. App. A1-A17), observing that "the FTC has broad legal power to issue investigative subpoenas" (*id.* at A3) and that such subpoenas should be enforced unless it is established that the subpoenas are " 'plainly incompetent or irrelevant to any lawful purpose.' " *Id.* at A4 (quoting *Endicott Johnson Corp.* v. *Perkins,* 317 U.S. 501, 509 (1943)).

The court of appeals rejected petitioners' contention that the actions of the Board are legally equivalent to the sovereign actions of a state legislature or state supreme court. The court concluded, as had the district court, that this contention was contrary to relevant decisions of this Court interpreting the state action doctrine, and that the Board, as a subordinate state agency, could assert state action immunity only to the extent that its actions are authorized by a "clearly articulated and affirmatively expressed" state policy. Pet. App. A4-A5.

The court of appeals ruled that, at this stage, it could not and should not decide whether the Massachusetts legislative scheme constitutes the requisite clear and affirmative articulation of state policy (Pet. App. A5-A11). The court noted that the mere existence of a statutory

scheme authorizing regulation would not immunize any and all anticompetitive actions taken "under the guise of regulation" (*id.* at A5-A6). The court concluded that it was not possible to resolve the clear articulation issue "until we know more precisely what [the Board's] activities are" (*id.* at A7).

The court of appeals also pointed out that restrictions on competition imposed by a board subject to control by private pharmacists might possibly be treated as "essentially" private restraints rather than public actions, requiring a showing that the conduct was actively supervised by the state in order to establish a state action defense. Resolution of that issue would have to await more facts, bearing particularly on how the Board actually functioned and on the role played by those petitioners who compete in the sale of prescription drugs while serving on a Board whose activities in that market might be anticompetitive. Pet. App. A7-A8. Finally, the court explained that "[a]ll depends upon precisely what conduct turns out to be at issue, its harms, its justifications, and its relation to the [Board's] basic statutory mission" (*id.* at A10-A11).[2]

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[2] The court of appeals explicitly rejected petitioners' contention that it could resolve the state action issue without a factual record. In so doing, the court distinguished this case from its earlier decision in *Interface Group, Inc.* v. *Massachusetts Port Authority*, 816 F.2d 9, 10-14 (1987) (*Massport*). In *Massport*, the court had held, looking only at the allegations of the antitrust complaint, that policy decisions of a state airport authority were protected by the state action doctrine. Judge Breyer, who wrote the opinions of the court in both *Massport* and the present case, noted that *Massport* was a substantive antitrust action, not a subpoena enforcement proceeding. Therefore, it had been possible to compare the challenged activities with the authorizing legislation (Pet. App. A8-A10). Moreover, *Massport* involved the question whether the legislature had intended the airport authority to regulate particular airlines' use of terminals and access to taxiways. Thus, the court "could not conceive how the activities attacked could

Because of this "factual uncertainty," the court of appeals held that the state action defense asserted by petitioners afforded no reason to quash the subpoenas in this case (*id.* at A11).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Review by this Court is unwarranted.

1. The procedural posture in which this case arises is essentially dispositive, particularly in light of the First Circuit's determination (Pet. App. A6-A11) that further factual development is necessary to resolve petitioners' claim of state action immunity. The principal inquiry in a subpoena enforcement proceeding is whether the evidence sought is plainly irrelevant to any purpose within the statutory authority of the investigating agency and whether the demand is unduly burdensome. *E.g., Endicott Johnson Corp.* v. *Perkins,* 317 U.S. 501, 509 (1943); *United States* v. *Morton Salt Co.,* 338 U.S 632, 652 (1950); *United States* v. *Westinghouse Elec. Corp.,* 788 F.2d 164, 170 (3d Cir. 1986); *FTC* v. *Carter,* 636 F.2d 781, 787-789 (D.C. Cir. 1980); *FTC* v. *Texaco, Inc.,* 555 F.2d 862, 872-873 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977); *FMC* v. *Port of Seattle,* 521 F.2d 431, 433-436 (9th Cir. 1975).[3] "Thus, while the court's function is neither

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fall outside the area of immunity delineated by clear state policy" (*id.* at A9-A10). In this subpoena enforcement case, by contrast, it was not possible to determine what activities would be challenged or to decide whether such activities lay close to, or far from, the center of the "state statutes' basic purpose" (*id.* at A10 (citing 816 F.2d at 13-14)).

[3] Petitioners have raised no objections, either in the proceedings below or before this Court, based on relevance or burden.

'minor nor ministerial,' * * * the scope of issues which may be litigated in an enforcement proceeding must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity." *FTC* v. *Texaco, Inc.*, 555 F.2d at 872 (quoting *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 217 n.57 (1946)).

Consistent with this rule limiting the scope of inquiry in a subpoena enforcement proceeding, this Court has repeatedly refused to adjudicate objections to an agency's regulatory jurisdiction in such proceedings. Such "coverage" claims, although they may be raised as a defense against an administrative complaint, are premature when raised in opposition to a subpoena unless it is patently clear under existing law that the agency would lack regulatory jurisdiction. *E.g.*, *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. at 509; *Oklahoma Press Publishing Co.* v. *Walling, supra; FTC* v. *Crafts*, 355 U.S. 9 (1957) (per curiam).[4] Indeed, even a purely legal claim that an agency investigation is barred by the res judicata effect of a prior order cannot be raised in a subpoena enforcement proceeding. *EEOC* v. *Children's Hosp. Medical Center*, 719 F.2d 1426, 1430 (9th Cir. 1983) (en banc). This "coverage" rule is a specific application of the general ad-

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[4] Accord *EEOC* v. *Peat, Marwick, Mitchell & Co.*, 775 F.2d 928, 930 (8th Cir. 1985), cert. denied, 475 U.S. 1046 (1986); *FTC* v. *Ernstthal*, 607 F.2d 488 (D.C. Cir. 1979); *ICC* v. *Bay State Transp. Brokers*, 579 F.2d 113, 115 (1st Cir. 1978); *Casey* v. *FTC*, 578 F.2d 793, 798-799 (9th Cir. 1978); *FTC* v. *Swanson*, 560 F.2d 1, 2 (1st Cir. 1977); *FTC* v. *Texaco, Inc.*, 555 F.2d at 879; *SEC* v. *Howatt*, 525 F.2d 226, 229-230 (1st Cir. 1975); *FMC* v. *Port of Seattle*, 521 F.2d at 434; *SEC* v. *Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1053-1055 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974); see also *FTC* v. *Markin*, 532 F.2d 541, 543-544 (6th Cir. 1976); *FTC* v. *Feldman*, 532 F.2d 1092, 1095-1096 (7th Cir. 1976).

ministrative law principle that, even as to questions of law, an agency has primary jurisdiction to determine the scope of its own jurisdiction. *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 647 (1972); *Casey* v. *FTC*, 578 F.2d 793, 798-799 (9th Cir. 1978); *American Gen. Ins. Co.* v. *FTC*, 496 F.2d 197, 200 (5th Cir. 1974).[5] As petitioners themselves informed the First Circuit: "[t]he need for courts to refrain from premature consideration of fact-based challenges to agency jurisdiction is well established" (C.A. Br. 33).

The opinion below is a routine application of this established body of controlling precedent to the two overlapping theories under which petitioners sought to invoke the state action defense. One theory was that this self-regulatory Board, although largely composed of and controlled by members of the regulated group, acted as the sovereign. This theory would have supported petitioners' claim of immunity under the state action doctrine because the sovereign itself—*e.g.*, the state legislature or the state supreme court when exercising legislative functions—enjoys automatic immunity. See *Hoover* v. *Ronwin*, 466 U.S. 558, 567-569 (1984). The court of appeals, however, declined to adopt this theory in the context of this subpoena enforcement case because it found that no such clear rule of law existed (Pet. App. A4-A5). That holding was correct. Far from being clearly "sovereign," state agencies and other subordinate governmental units are regularly assumed to be nonsovereign actors subject to the usual "clear articulation" requirement of the state action

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[5] This principle, which requires exhaustion of administrative remedies in the agency proceeding, is based both on recognition of the need for administrative autonomy and on considerations of judicial economy. *McKart* v. *United States*, 395 U.S. 185, 195 (1969); *FTC* v. *Swanson*, *supra*; *American Gen. Ins. Co.* v. *FTC*, *supra*.

doctrine.[6] See P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.3, at 114 (Supp. 1987) (collecting cases); *id.* ¶ 212.2c, at 111 (discussing *Southern Motor Carriers Rate Conference, Inc.* v. *United States,* 471 U.S. 48, 62-63 (1985)). This is particularly so when the state agency is—like the Board in this case—largely composed of members of the regulated industry. See *id.*¶ 212.9f; 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 217a3, at 107-108 (1978).

Petitioners' other theory before the court of appeals was that the "clear articulation" requirement, if applicable, was met merely because there was a statutory framework authorizing some form of regulation by the Board.[7] The court of appeals rejected this argument because it was premature unless and until the court had before it specific allegations of identified unlawful conduct, which could only be made after the FTC finished gathering facts and evidence (Pet. App. A7-A11). Since it was therefore not patently clear that there could be no legal basis for FTC enforcement activity as a result of the investigation, affirmance of the district court was required by this Court's cases defining and limiting the role of federal courts in administrative subpoena enforcement proceedings.

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[6] Ordinarily, a restraint does not constitute immune "state action" unless it is " 'one clearly articulated and affirmatively expressed as state policy' " and is " 'actively supervised' by the State itself." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.,* 445 U.S. 97, 105 (1980) (quoting *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389, 410 (1978) (plurality opinion)). This Court, however, has declared it "likely" that the second requirement—active supervision—is inapplicable when the actor is a state agency. *Town of Hallie* v. *City of Eau Claire,* 471 U.S. 34, 46 n.10 (1985).

[7] Petitioners do not press their "clear articulation" position before this Court. But cf. Pet. 50 n.21.

2. Petitioners err in their contention (Pet. 12-29, 34-50) that the First Circuit's state action analysis is inconsistent with this Court's precedents. To the contrary, this Court's precedents clearly preclude petitioner's theory that the Board is "*ipso facto* immune" under the state action doctrine (Pet. 34).

This Court has expressly regarded as sovereign acts of the state—"*ipso facto* immune" without any showing of clear articulation or active supervision—the legislative actions of state legislatures and the actions of state supreme courts acting in a legislative capacity; it seems appropriate that similar actions of a governor or other chief executive be so regarded as well, although this Court has reserved even that question. *Parker* v. *Brown,* 317 U.S. at 350-351 (legislature acts as the sovereign); *Bates* v. *State Bar,* 433 U.S. 350, 360-363 (1977) (same as to supreme court acting as the sovereign); *Hoover* v. *Ronwin,* 466 U.S. 558, 568 n.17 (1984) (resolution of question as to state governor not required). Since its earliest relevant decisions, however, this Court has squarely rejected the argument that *Parker* v. *Brown* stands for the proposition "that all governmental entities, whether state agencies or subdivisions of a State, are, simply by reason of their status as such, exempt from the antitrust laws." *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389, 408-409 (1978) (plurality opinion); see *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 791 (1975); *Bates* v. *State Bar, supra.*[8]

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[8] Petitioners dismiss the plurality's observations in *City of Lafayette* as ones "directed to *ultra vires* activities" (Pet. 43 n.17). Petitioners are mistaken. This Court's state action cases have never drawn a line between *ultra vires* and *intra vires* activities of state agencies (although *ultra vires* activities are unlikely to be immune). Rather, the Court has drawn a line between actions that are and actions that are not undertaken pursuant to clearly articulated state policy to

Moreover, in its opinion in *City of Lafayette*, this Court quoted with approval the Fifth Circuit's ruling that "[a] subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws." 435 U.S. at 393-394 (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 532 F.2d 431, 434-435 (5th Cir. 1976)) (footnotes omitted by quoting Court). *City of Lafayette* followed the decision in *Goldfarb*, in which this Court unanimously ruled that the anticompetitive conduct of a state agency (the state bar) was not immunized unless the agency showed affirmative authorization or approval by the sovereign (*Goldfarb*, 421 U.S. at 791).[9] The *Goldfarb*

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displace competition with regulation. See generally P. Areeda & H. Hovenkamp, *supra*, ¶ 212.3a, at 116, 125. The Court has on several occasions allowed substantive antitrust scrutiny of actions that are within the powers of the state entity that directed or took them—*i.e.*, *intra vires* actions—precisely because no clearly articulated state policy supported them. *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb* v. *Virginia State Bar, supra;* cf. *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978). These decisions contradict petitioners' assertion that, for purposes of antitrust state action immunity, "a state agency acting *intra vires* is considered to be acting as the state" (Pet. 41; see Pet. 32-33).

[9] Although *Goldfarb* clearly holds that there is a fundamental distinction between the sovereign and subordinate agencies, petitioners seek to distinguish the case (Pet. 26, 28 n.13). They assert that the state bar association was really a private entity, not a state agency—an ironic argument in light of petitioners' apparent umbrage (see Pet. 14, 24-25, 33, 44 n.18) at any possible inquiry by a federal antitrust court into whether what is nominally a state agency is engaged in "activities [that] are 'essentially' those of private parties" (Pet. App. A8). Petitioners also suggest that the supervision of the bar association's actions by the state supreme court, rather than the state legislature, somehow makes *Goldfarb* irrelevant to a case involving a self-regulatory board. Both contentions are wrong. This Court in *Goldfarb* regarded the state bar association as a state administrative agency with regulatory and disciplinary powers (421 U.S. at 776-777 &

opinion also held that mere status as a state agency regulating professional conduct did not allow the state bar to engage in a conspiracy to advance the pecuniary interests of its professional members by fostering anticompetitive restrictions on competition. 421 U.S. at 791-792 (citing *Gibson* v. *Berryhill,* 411 U.S. 564, 578-579 (1973)). See generally 1 P. Areeda & D. Turner, *supra,* ¶ 217a3, at 107-108.

This Court's more recent state action decisions have consistently applied this distinction between acts of the sovereign itself and actions of subordinate state agencies and municipalities. These cases have repeatedly reaffirmed that restraints on trade imposed by subordinate agencies are immune from antitrust scrutiny only if imposed pursuant to a clearly articulated state policy—articulated by the sovereign, not simply by the subordinate agency or municipality—to displace competition with state regulation. *Community Communications Co.* v. *City of Boulder,* 455 U.S. 40, 53-54 (1982) (mere general delegation of power to municipality insufficient); *Southern Motor Carriers Rate Conference, Inc.* v. *United States,*

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n.2). In this Court's subsequent decision in *City of Lafayette*, the plurality rejected the argument that the state bar had been acting in a private capacity and emphasized that the holding of *Goldfarb* had involved "a state agency by law acting in its official capacity." *City of Lafayette*, 435 U.S. at 411 n.41. Likewise, in *Southern Motor Carriers Rate Conference, Inc.* v. *United States,* 471 U.S. at 63, the Court reiterated with approval its determination in *Goldfarb* that the state bar had been "a special type of 'state agency' " but had not been immune from antitrust scrutiny, and the Court concluded from *Goldfarb* that only such entities as a state legislature and state supreme court, not a state public utilities commission, were sovereign. Thus, nothing in this Court's state action case law supports petitioners' purported distinction between judicially authorized regulatory agencies and other regulatory bodies.

471 U.S. 48, 62-63 (1985) (only legislature, not subordinate agencies, could provide clear articulation needed to immunize private rate-setting); *Town of Hallie* v. *City of Eau Claire,* 471 U.S. 34, 46 n.10 (1985) (assuming that subordinate agencies, like municipalities, must show clear articulation).

Most significantly, in *Ronwin,* this Court was called on to determine whether challenged conduct was that of the state supreme court or of subordinate officials. This Court emphasized that the actions of subordinate agencies and municipalities are subject to "[c]loser analysis" because the "activity at issue is not *directly* that of the legislature or supreme court, but is carried out by others pursuant to state authorization" (466 U.S. at 568 (emphasis added; footnote omitted)). In such cases, it becomes important "to ensure that the anticompetitive conduct of the State's representative was contemplated by the State" (*ibid.*).[10] The opinion in *Ronwin* adverted repeatedly to the established distinction between action taken directly by the sovereign and action taken by the sovereign's subordinates.[11]

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[10] Petitioners contend (Pet. 27) that it was only in "dicta" that this Court in *Ronwin* referred to agencies other than the legislature or supreme court as "nonsovereign state representative[s]" (466 U.S. at 569). In fact, the entire issue in *Ronwin* was whether the conduct challenged was that of the state supreme court or that of a subordinate agency, which would have had to show clear articulation (*id.* at 568-569, 581). If the legal standards for establishing state action had been the same no matter how this question was answered (as petitioners seem to argue), then the Court in *Ronwin* would have had no state action issue to resolve.

[11] For example, the Court observed that its attention had not been drawn to any profession other than the legal profession in which licensing was "determined directly by the sovereign itself" (466 U.S. at 581 n.34). Yet, if the "*intra vires*" actions of self-regulatory boards

In short, it is petitioners' unsupported "*ipso facto*" theory, not the opinion below, that cannot be reconciled with this Court's state action decisions.

3. Petitioners contend that there is a conflict among the courts of appeals on the question presented by the petition (Pet. 34-50). But they do not and cannot in fact show that any court of appeals would have quashed the subpoenas in this case.

a. Petitioners contend that their "*ipso facto*" theory would have prevailed in the Fifth and Ninth Circuits (Pet. 29-31, 32-33). In fact, neither of those courts takes a view of the law that is inconsistent with the decision below.

The sole Fifth Circuit case on which petitioners rely (Pet. 30-31) is the one-page opinion in *Limeco, Inc.* v. *Division of Lime,* 778 F.2d 1086 (1985). In that case, the plaintiff competed with the Mississippi Lime Division, which had a statutory mandate to sell crushed limestone to Mississippi farmers at cost. The plaintiff apparently regarded compliance with that statutory mandate as monopolization or attempted monopolization forbidden by Section 2 of the Sherman Act, 15 U.S.C. 2. The court brushed aside that argument in a single paragraph that cited only *Parker* v. *Brown, supra. Limeco* was a classic case for immunity in light of the clearly articulated state

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were necessarily regarded as the action of the sovereign itself (see Pet. 32-33, 41), it would be quite typical for professional licensing to be determined directly by the sovereign itself. The Court also drew a distinction between the sovereign and "the committees, commissions, or others who necessarily must advise the sovereign" (466 U.S. at 580). Yet, if petitioners' theory is correct, sovereignty is an attribute shared by supreme and subordinate state officials alike, and there would be little need or room anywhere in state government for nonsovereign actors.

policy to sell crushed limestone to farmers at cost, in light of the nature of the agency whose activities were challenged, and in light of the truly ministerial nature of the acitivities of that agency. See P. Areeda & H. Hovenkamp, *supra,* ¶ 212.2d. at 114 n.43. The court had no occasion to—and did not remotely—suggest that the activities of self-regulatory boards enjoy any kind of per se immunity from the federal antitrust laws. In particular, the court said nothing that could be taken to overrule *United States* v. *Texas State Bd. of Public Accountancy,* 592 F.2d 919 (5th Cir. 1979), aff'g on the basis of opinions below 464 F. Supp. 400 (W.D. Tex. 1978), cert. denied, 444 U.S. 925 (1979), in which the court had found that a state regulatory board was not immune—automatically or otherwise—from the federal antitrust laws. See also *City of Lafayette* v. *Louisiana Power & Light Co.,* 532 F.2d 431, 434-435 (5th Cir. 1976), aff'd, 435 U.S. 389 (1978).

The Ninth Circuit's case law may fairly be described as more diffuse, but it does not support petitioners' position. First, in only one relevant Ninth Circuit case has a state agency sought to stop an FTC proceeding in its tracks, rather than asserted the state action defense in response to specific accusations of illegal conduct. *California ex rel. Chistensen* v. *FTC,* 549 F.2d 1321, cert. denied, 434 U.S. 876 (1977). That decision, written by Judge Goodwin, reaches the same conclusion as the decision below: *i.e.,* that that doctrine was prematurely invoked because "a full factual development is an essential prerequisite for determining the *Parker v. Brown* question" (549 F.2d at 1325).

Second, even in the context of a state action defense in response to specific charges, the Ninth Circuit's most recent decision on point squarely rejects petitioners' "*ipso*

facto" theory. In *Washington State Elec. Contractors Ass'n* v. *Forrest,* No. 85-4232 (Feb. 8, 1988), the plaintiff challenged regulations of the Washington State Apprenticeship and Training Council, established by a state statute to consist of six members appointed by the state Director of Labor and Industries, one member appointed by the Governor, and two state officials as ex officio members (slip op. 1420). The regulations under challenge had been validly promulgated by the Council under general statutory grants of authority (*id.* at 1420-1421). Judge Goodwin wrote for the court (*id.* at 1424-1425):

> At the outset, we reject defendant's contention that the Council's actions are in effect actions of the state legislature as sovereign and therefore "absolutely immune" from antitrust scrutiny. A clear distinction exists between acts undertaken by the legislature or state supreme court and acts delegated to and carried out by others "pursuant to state authorization." *Hoover* [v. *Ronwin*], 466 U.S. at 568. Only the former are absolutely immune. *Id.* at 567-68, *citing Parker,* 317 U.S. at 350-51. * * * [S]crutiny * * * is required when agents of the state rather than the state itself conduct anticompetitive activities.

Thus, the Ninth Circuit has rejected petitioners' position in clear terms.[12]

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[12] Indeed, as petitioners admit (Pet. 32), the Ninth Circuit recently held that a subordinate state agency (actually a member of a self-regulatory board) must establish that challenged conduct was supported by a clearly articulated policy of the state legislature, the standard correctly applied below. *Patrick* v. *Burget,* 800 F.2d 1498, 1506-1507 (9th Cir. 1986), cert. granted, No. 86-1145 (argued Feb. 22, 1988).

To be sure, Judge Goodwin's opinion for the court in *Deak-Perera Hawaii, Inc.* v. *Department of Transp.*, 745 F.2d 1281 (9th Cir. 1984), cert. denied, 470 U.S. 1053 (1985), contains language that could be read to support the proposition that all state executive branch agencies are sovereign for purposes of state action immunity, and another Ninth Circuit panel recently treated *Deak-Perera* as controlling in *Charley's Taxi Radio Dispatch Corp.* v. *SIDA of Hawaii, Inc.*, 810 F.2d 869, 875-876 (1987). But both cases involved the same cabinet agency of the Hawaii state government, not a self-regulatory agency consisting principally of members of the regulated industry—a kind of agency as to which the *Deak-Perera* court said "the inquiry would be different" (745 F.2d at 1283 (citing *Benson* v. *Arizona State Bd. of Dental Examiners*, 673 F.2d 272, 274-276 (9th Cir. 1982)); see also 745 F.2d at 1283 n.1). Thus, even leaving aside the Ninth Circuit cases that squarely repudiate petitioners' position, neither *Deak-Perera* nor *Charley's Taxi* conflicts with the decision below. See P. Areeda & H. Hovenkamp, *supra*, ¶ 212.2c, at 111-112 & n.32. There is no conflict warranting resolution by this Court in the context of this case.

b. Petitioners also claim a conflict in the circuits based on a perceived holding by the court of appeals "that, to demonstrate clear and affirmative legislative support for its policies, a regulatory agency must demonstrate (here, to the satisfaction of a specialized federal agency) that its policies serve a legitimate regulatory purpose, are reasonable, and do not represent essentially private activities" (Pet. 33). This "holding" is also said to be inconsistent with decisions of this Court (Pet. 45-50).

Petitioners have misunderstood the decision below, and in any event this case hardly presents an appropriate vehicle for elaboration of the criteria to be applied as part of the

"clear articulation" inquiry. The passage that petitioners find troubling is merely an explanation by the court of appeals of why the clear articulation issue could not be resolved because of "factual uncertainty." The court listed a variety of issues that might be relevant to resolution of that issue, including whether any restrictions ultimately challenged had a legitimate regulatory purpose. Pet. App. A5-A11. Far from holding that such proof would be required, the court went on to state that, even if no legitimate regulatory purpose emerged, the activities might still be supported by clearly articulated state policy, if closely related to the basic purpose of the legislature in creating the regulatory scheme (*id.* at A7, A9-A10).

Furthermore, the issue of when activity by state actors is (and when it is not) supported by clearly articulated state policy is a difficult question that is particularly ill suited to abstract discussion unilluminated by a detailed factual and legal context. See generally 1 P. Areeda & D. Turner, *supra*, ¶ 214; P. Areeda & H. Hovenkamp, *supra*, ¶ 212.3. We do not doubt that this Court will and should have more to say on that subject, but this case presents a singularly inappropriate vehicle for further pronouncements by the Court. There is no factual record in this case, nor does the FTC know at this point which Board activities—if any—it will view as objectionable under the antitrust laws. Thus, any opinion by this Court elaborating on "clear articulation" criteria would provide nothing more than advice to the courts below and the FTC on how to go about making future determinations. This Court's certiorari jurisdiction does not exist for the purpose of providing such hypothetical advice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States

CHARLES F. MONAHAN, ET AL.,
Petitioners,

-vs-

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

AMICUS CURIAE BRIEF OF THE STATE OF NEW JERSEY

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Appeals for the First Circuit

AMICUS CURIAE BRIEF OF THE STATE OF NEW JERSEY

STATEMENT OF AMICUS INTEREST

Since early in 1984 the Federal Trade Commission (hereinafter the "FTC"

or the "Commission") has initiated investigations and in some cases filed complaints and entered final orders in enforcement actions against state professional licensing boards in at least twenty states, asserting the authority to do so under Section 5 of the Federal Trade Commission Act. In New Jersey alone, five of the professional boards within the State Department of Law and Public Safety have been notified that the FTC is conducting a "preliminary nonpublic investigation" of their activities in promulgating advertising regulations which the FTC "believes" may violate 15 U.S.C. § 45 in that they may restrict competition and injure consumers. Without conceding that the FTC investigations were within the Commission's Congressionally authorized jurisdiction

and recognizing that the issue of whether such jurisdiction exists has not been settled by the courts, the New Jersey Boards cooperated to a limited extent with the investigations. However, document requests deemed to be overly burdensome were refused, and, with a few exceptions,* the Boards refused to concede that their challenged regulations were unnecessarily anticompetitive, in the face of strong pressure exerted by FTC representatives to repeal or to amend them in ways suggested by the Commis-

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* Pursuant to New Jersey law, Board regulations must be periodically reviewed and many of the Boards, in concert with the Division of Law and the Division of Criminal Justice, Antitrust Section, were already engaged in reviews of advertising regulations because of concerns over commercial speech and anti-competition issues.

sion.* With one exception the notices of the pending investigations included a request to "interview" the Board members and the Board's executive director. These requests were not pressed until November 2, 1987 when a letter was sent to the Board of Veterinary Medical Examiners asking that its members submit to depositions "voluntarily," stating that if the Board members refused, a subpoena would be issued.

New Jersey is, therefore, submitting an amicus brief in this matter in support

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* In the one case where a Board amended the only one of its regulations singled out by the FTC as unnecessarily anticompetitive (a regulation promulgated in 1970, but never enforced) the Board refused to agree to the entry of a proposed consent order which would have subjected the Board to direct oversight

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of petitioner because it appears likely that, should the decision at issue here be allowed to stand, the members of four of the affected New Jersey Boards and their executive directors (approximately 40 people in all) may also be subjected to compulsory process by the Commission, and may eventually be served with formal administrative complaints, as was the case with the Massachusetts Board of Registration in Optometry and others.

Amicus believes that the Federal Trade Commission's assertion of the jurisdiction to engage in such administrative enforcement actions against

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by the FTC in its future regulatory and disciplinary activities in the area of advertising regulation.

state agencies is in fact "plainly spurious" (cf. FTC v. Swanson, 560 F.2d 1, 2 (1st Cir. 1977)) and that the question of whether the FTC is mistakenly asserting this jurisdiction should be resolved promptly, not just because of the obvious substantial impact on the resources of the states involved and of the Commission itself, but because the Commission's assertion of such jurisdiction constitutes an unprecedented and possibly unconstitutional direct attack on state sovereignty that was never intended by Congress. The Commission's present activity therefore implicates important national policies of federalism vis a vis antitrust enforcement which can ultimately be resolved only by this Court. Amicus further believes that the instant case provides an appropriate factual

setting for the resolution of this important question. Amicus therefore urges that the petition be granted.

SUMMARY OF ARGUMENT

The Federal Trade Commission Act (hereinafter the "FTCA") was never intended by Congress to empower the Commission to enforce the antitrust laws against state boards and their members and to issue administrative orders purporting to bind the states' future regulatory and adjudicative conduct. Under settled principles of statutory interpretation, the Commission's jurisdiction over "persons, partnerships and corporations" should be deemed not to include such public entities. Moreover, the assertion of such jurisdiction by a federal administrative agency may be prohibited by Tenth Amendment principles.

This basic question should have been addressed by the Courts below where the FTC's authority even to investigate the Massachusetts Board was based on an assumption of just such jurisdiction. This issue is clearly not coextensive with the Parker state action immunity issue (See Parker v. Brown, 317 U.S. 341 (1943)) which the decision below addresses. In any event, on either issue the court below had before it sufficient information to make the required inquiries and to have decided as a matter of law that the subpoenas should not have been enforced.

ARGUMENT

STATE AGENCIES SUCH AS THE MASSACHUSETTS BOARD OF REGISTRATION IN PHARMACY ARE NOT "PERSONS" WITHIN THE MEANING OF 15 U.S.C. § 45 SUBJECT TO PROSECUTION IN AN ADMINISTRATIVE PROCEEDING BEFORE THE FEDERAL TRADE COMMISSION AND TO ADMINISTRATIVE CEASE AND DESIST ORDERS PROHIBITING PROMULGATION AND ENFORCEMENT OF REGULATIONS PURSUANT TO STATE LAW. THE SUBPOENAS ISSUED IN THIS MATTER WERE BASED ON THE COMMISSION'S PLAINLY SPURIOUS ASSERTION OF SUCH ENFORCEMENT AUTHORITY AND THEREFORE SHOULD NOT BE ENFORCED.

In the decision challenged by petitioners here, the Court of Appeals accepted as its first premise that resolution of the question of whether the FTC had any lawful purpose in issuing the contested subpoenas depends on whether the Board regulations were entitled to immunity under the doctrine first enunciated in Parker v. Brown, 317 U.S. 341 (1942).

The Court found that the immunity question involved a factual dispute which should not be settled in a subpoena enforcement proceeding (Pall). The Court of Appeals erred in this initial premise and its final decision.* The resolution of the question of whether the FTC had any lawful purpose in deposing the Board members depends in the first instance on whether the Commission has any statutory

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* With respect to the Circuit Court's disposition of the Parker "immunity" defense for enforcement of the subpoena, Amicus fully agrees with petitioners that the Parker issue should also have been decided in their favor on the record below, without the need for further fact-finding. The regulations at issue were identified and the nature and sufficiency of the "state action" involved in their promulgation and enforcement is clear from the Massachusetts statutory scheme and case law. Any information to be gleaned from an examination of the Board members would be irrelevant to a resolution of the issue.

authority to prosecute a state agency in an administrative proceeding for promulgating regulations allegedly violative of the antitrust laws, the admitted focus of the investigation below (Pa66 to Pa67). Amicus contends that the Commission lacks such authority.

The Federal Trade Commission is a creature of statute and cannot act in excess of the powers that have been delegated to it. Exxon Corp. v. F.T.C., 665 F.2d 1274, 1277 (D.C. Cir. 1981). These powers are derived from the Federal Trade Commission Act, 15 U.S.C. § 41 et seq. The Act declares that "unfair methods of competition in or affecting commerce, and unfair and deceptive acts and practices in or affecting commerce are ... unlawful." 15 U.S.C. § 45(a)(1). The Commission is empowered to "prevent

persons, partnerships, or corporations" from engaging in such proscribed conduct. Where the Commission has reason to believe that a "person, partnership, or corporation" is engaging in such conduct it can proceed to issue an administrative complaint against such "person, partnership, or corporation." 15 U.S.C. § 45 (b).

It was clear from the record in the subpoena enforcement proceeding below that the Commission's investigation was nothing more than a preliminary step leading to just such an enforcement proceeding against petitioner (Pa40 to Pa41, Pa52, Pa61, Pa63, Pa66 to Pa67). It is equally clear that Congress never intended agencies in the executive departments of state governments to be included as "persons" within the meaning

of Section 45, and thus the subjects of such federal administrative agency enforcement actions. The plain language and legislative histories of Section 45 and related sections of the act together with relevant case law show no intent to permit such extraordinary and possibly unconstitutional wholesale intrusion into the sensitive area of federal-state relations.

A. The Plain Language of the Provisions of the Federal Trade Commission Act and the Obvious Inferences to be Drawn Therefrom Clearly Limit the "Persons" Included in the Commission's Enforcement Authority to Private Entities Engaged in Business.

Within the Federal Trade Commission Act, the whole context of the sections in which "persons, partnerships, or corporations" appear as possible targets of FTC

enforcement proceedings relate to business milieus. With one significant exception, nowhere in the Act is the term "person" defined or used in a context to suggest a Congressional intent to include a state agency or officials within the ambit of the term. For example, the limiting exceptions in Section 45(a)(2) are all business entities. Also, the factors to be included in a penalty determination under Section 45(m)(1)(c) include "the effect on the ability to continue to do business." The additional powers of the Commission include investigations of the organization, business, conduct, practices and management of "persons, partnerships, or corporations." 15 U.S.C. § 46(a). The Commission is also required to reduce the impact of this section on "small businesses." In

Section 52, "persons, partnership or corporations" are prohibited from disseminating false advertisements inducing purchases of food, drugs, devices or cosmetics." This whole section obviously has no application to government agencies and yet the same phrase is used without qualification.* Finally, in civil actions by the Commission under

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* Significantly, the FTC's investigative authority under 15 U.S.C. § 49 was originally confined to corporations, but was amended to include "persons, partnerships or corporations" in 1975 only to parallel other sections of the Act. See P.L. 93-637, Title II, § 203. Comparison of this pointed repetition of "persons, partnerships, or corporations" in the FTCA with the use of the generic term "person" in the antitrust acts (see, e.g. 15 U.S.C. §§ 7, 12 and 15) provides another strong argument for the more limited scope of the FTCA term as simply describing the various possible kinds of business entities subject to the Commission's enforcement powers.

Section 57(b), the court may redress injury to "consumers or other persons, partnerships, or corporations" (obviously meaning consumers or other business entities, as competitors).

The conclusion that the "persons, partnerships or corporations" who may violate Section 45 are business entities is reinforced by the fact that, where "persons" is meant to include state entities, it is specifically so defined. In Section 57b-1 the term "persons," as used to designate those who may be called on as witnesses to give oral testimony or to produce documents in connection with an investigation, is defined for purposes of that section only to include "any natural person, partnership, corporation, association, or other legal entity, including any person acting under color

or authority of state law." This 1980 extension of the investigatory powers of the Commission simply made it clear that civil investigative demands could be served on "persons" other than the business entity that is the focus of the investigation and that all "persons" as defined in Section 57b-1 could be called upon as witnesses. That Congress deemed it necessary to expressly include agents of state governments in the definition of "persons" for this section strongly indicates that government entities were not intended to be included as targets of FTC enforcement authority elsewhere in the Act. Had Congress intended state agencies and officials to be included in the definition of "persons" under Section 45, Congress would have so specified as it did in Section 57b-1. Cf.

United States v. Cooper, 312 U.S. 600, 607 (1941).

B. The Legislative History of the FCTA Shows No Intent to Permit Administrative Enforcement Actions Against State Agencies. Moreover, Where Congress Has Spoken to the Issue of Antitrust Remedies Available Against Government Entities, It Has Evinced a Clear Intent to Limit Such Remedies to Court Actions Enjoining Enforcement of Preempted Enactments.

The legislative histories of the FTCA and its many amendments contain no hint of the possibility that the Commission's enforcement powers extended to state agencies or in fact to any public entity.* Nevertheless, the Commission

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* The legislative history of the Federal Trade Commission Improvements Act of 1980 does, however, call attention to

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asserted in its brief to the Court of Appeals that the 1975 Amendment (in

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the FTC's propensity to go beyond congressional intent in exercising its statutory powers. Thus, citing numerous instances of the FTC's incorrect assumption of jurisdiction, Congress enacted the FTC Improvements Act expressly limiting FTC rulemaking authority in the areas of used car warranties, children's advertising and voluntary standards and certifications of manufactured goods. The Improvements Act also amended § 6 of the FTCA to explicitly make the Commission's investigative and reporting powers inapplicable to the business of insurance because the FTC was misconstruing the jurisdictional limitations clearly set forth in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011- 1015, which declared that it was Congress' policy "that the continued regulation and taxation by the several States of the business of insurance is in the public interest." The Senate Report on this bill noted that the FTC had for eighteen months devoted a "considerable portion of its resources" to insurance industry investigations that were unauthorized by its statute. S. Rep.

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P.L. 94-637, § 201(a)) substituting "in or affecting commerce" for "in commerce" wherever the phrase appeared within the FTCA extended Commission jurisdiction to include state regulatory bodies (Brief for Appellee, p. 22, n. 20). Yet, this argument is rebutted in the legislative history of the amendment, which speaks solely to remedying the geographic impediment to FTC jurisdiction where there was no proof of actual interstate movement of goods. See H.R. No. 93-1107, 93rd Cong. 2nd Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 7702, 7711-7712. See, also, Jefferson Cty. Pharm. Assoc.

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No. 96-500, 96th Cong., 2d. Sess. 2, 13-15, reprinted in 1980 U.S. Code Cong. & Admin. News 1102, 1103, 1114-1116.

v. Abbott Labs, 460 U.S. 150, 156 n. 12 (1983) (Robinson-Patman Act's coverage extending only to acts "in commerce" as compared to the Sherman and Clayton Acts extension to activity "in or affecting commerce" signifies a difference only in the "transactions" covered rather than that "Congress chose not to cover the same range of persons whose conduct is otherwise subject to the Act.")

Significantly, at the same time that the Commission began its numerous actions against state professional boards, an activity finding no support either in the provisions of the FTCA or in Congressional statements as to the Act's purpose and meaning, Congress was enacting the Local Government Antitrust Act of 1984, providing an explicit state-

ment of its intent to limit antitrust action against government entities to actions in the courts seeking injunctive relief against enactments allegedly preempted by the antitrust laws. This 1984 Act, codified as 15 U.S.C. §§ 34-36, was Congress' response to this Court's holding in Community Communic. Co. v. City of Boulder, 455 U.S. 40 (1982). The Boulder case appeared to support the finding of liability for damages as well as injunctive relief under the Clayton Act against a municipality exercising the purely governmental function of passing and enforcing an ordinance which was inconsistent with the antitrust laws and not saved from preemption by Parker "immunity." Congressional concern over the prospect of large damage awards against local governments prompted the

passage of the Act, which exempts local governments and their officials and employees from damages under the Clayton Act. The Act does not mention state governments or officials. The obvious inference to be drawn from the failure to include state agencies and officials within the protection of the Local Government Antitrust Act is that Congress assumed that state agencies were already "immune," at least from penalties and damages, and needed no such protection. This conclusion is confirmed by the Act's legislative history.* Congress accepted

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* Thus, House Report No. 98-965 noted that the legislative history of the Sherman Act "reveals no evidence of an express Congressional intent to apply antitrust laws to either state or local governments." H.R. No. 98-965, 98th

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the decision of this Court as to the interpretation of "persons" in the

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Cong., 2d Sess. 4, reprinted in 1984 U.S. Code Cong. & Adm. News 4602, 4605. Further, the House Committee noted that the Sherman Act was clearly directed at "combinations 'in restraint of trade' as that phrase was technically understood under English common law...." Id.

> Under English common law, "restraints of trade" applied solely to the actions of individuals; a "monopoly" could only arise from an act of sovereign power.... Thus restraint of trade prohibitions -- such as those appearing in statutes forbidding "engrossing" and "forestalling" -- were directed against "whatsoever person or persons...." No status or reported case has been found in which a "body politic", as opposed to a private person or "body corporate", was subjected to sanction under restraint of trade statutes. [Id. n. 2 (citations omitted)]

Clayton Act, but the clear sense of the Congressional action is that the appropriate relief against any government entity violating the antitrust laws should be limited to injunctive relief in the courts prohibiting the enforcement of objectionable legislation.*

The FTC's actions against state licensing boards envision, inter alia, potential monetary recovery see, e.g., 15 U.S.C. §§ 45(l)(m), expressly rejected by Congress as a salutary remedy available against local governments. See 15

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* The legislative history indicates that the Department of Justice or the FTC retained the right to seek injunctive relief from the courts in enforcement actions against local governments under other statutory provisions. H.R. No. 98-965, 98th Cong. 2d Sess. 2, reprinted in 1984 U.S. Code Cong. & Admin. News 4602, 4603.

U.S.C. §§ 34-36. As previously noted, the legislative history of the Local Government Antitrust Act indicated that Congress assumed that such remedies were unavailable as against states. Thus, the FTC's exercise of jurisdiction in this matter is completely inconsistent with recent expressions of Congressional intent concerning antitrust remedies available against government entities.

C. FTC Enforcement Actions Against State Agencies Constitute an Unconstitutional Infringement on State Sovereignty.

As argued, ante, Congress clearly did not intend to grant the unprecedented authority the Federal Trade Commission has so boldly asserted here. Amicus also believes that the separate question of whether Congress could have intended to authorize such jurisdiction is one of

constitutional dimension, in that the Commission's mistaken assertion of jurisdiction over state agencies not only constitutes an offense to general principles of federalism but in fact exceeds the constitutional limits on federal action affecting the states under the Commerce Clause.

In Garcia v. San Antonio Metro, 469 U.S. 528 (1985) this Court, while raising the threshold beyond which legislation may be found to exceed the bounds of the Commerce Clause, nevertheless acknowledged that the States do retain "a significant measure of sovereign authority." Id. at 549 (quoting from Justice Powell's dissent in EEOC v. Wyoming, 460 U.S. 226, 269 (1983)). The Court declined, however, to "identify or define what affirmative limits the constitutional struc-

ture might impose on federal action affecting the States under the Commerce Clause." Id. at 556.*

Examination of the enforcement provisions of the FTCA and the ways in which they have already been utilized by the Commission against State professional boards clearly demonstrates that in this case the "affirmative limits" of federal power have been exceeded. The Commis-

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* The Commission's apparent erroneous belief that there are no such constitutional limits on its jurisdiction has already been noted in N.C. St. Bd. of Regis. for Pro. Eng. v. FTC, 615 F. Supp. 1155 (D.C. N.C. 1985) (dismissing on ripeness grounds a challenge to the Commission's issuance of subpoenas to a North Carolina professional board, where the Commission had not yet moved to enforce the subpoenas pursuant to 15 U.S.C. § 49). There, the Court pointed out that, despite the Commission's assertions, Garcia had not written the Tenth Amendment out of the Constitution. 615 F. Supp. at 1162, n. 7.

sion's statutory enforcement powers include prosecution in an administrative adjudication, the issuance of final cease and desist orders and the enforcement of those orders in actions seeking injunctions and substantial civil penalties. 15 U.S.C. § 45. Case law interpreting these provisions has accorded the FTC enormous power to fashion orders not only to halt past unlawful practices but to "fence in" future conduct.* There can

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* The breadth of the Commission's power to enforce Section 5 of its Act was described as including its power to declare unlawful under its Act practices that "conflict" with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws. FTC v. Brown Shoe Co., 384 U.S. 316, 320-321 (1966). In FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972), the FTC was likened to a "court of equity" which is empowered to

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be no dispute that the focus of the Commission's investigation here is the exercise of the full panoply of these powers against the activity of a State agency exercising strictly governmental functions. The regulations challenged by the Commission have been enacted in accordance with Massachusetts law which gives them the same effect as state laws (See Pb15, Pa72 to Pa74). The Board is also empowered to enforce these regulations and may, after an administrative hearing, penalize its licensees for their

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consider "public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws." Id. at 244. See also, F.T.C. v. National Lead Co., 352 U.S. 419,431 (1957).

violation or the violation of the statutes governing the practice of pharmacy. (Mass. Gen. L., ch. 112, § 40, § 42A). Board decisions in these matters are appealable directly to the appellate courts (Mass. Gen. L., ch. 112, § 64). The exercise of these quasi-legislative and quasi-judicial functions are indisputably the attributes of state sovereignty.

The Massachusetts legislative scheme was enacted under its police powers and dates back to 1885. This kind of regulatory scheme is traditionally the exclusive province of the states. States license members of professions to ensure that they are qualified according to a standard set by the state and regulate their practice thereafter according to standards of conduct deemed necessary for

the protection of the health and safety of the public.* This Court has

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* The consensus of the states is that the regulation of professional services presents special problems, such as the establishing of qualifications for licensure, the examination of applicants and the setting of professional standards, which require that some of the regulators be members of the regulated community. The obvious direction of the Commission "investigation" in this case, where the Commission is proposing to question the Massachusetts Board, six members of which are pharmacists, about "the role of pharmacists and related professional and trade associations in the enactment, amendment, enforcement, and interpretation of the Regulations" (Pa61), is to directly interfere with the Board's regulatory and adjudicative functions and also to remold the basic structure of state regulation of the licensed professions.

The inquiry sanctioned by the Circuit Court below was by the Court's own description an inquiry grounded on the status of the Board members as members of the regulated profession who might, despite the fact that they are clearly public officials under the Massachusetts

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consistently recognized the states' special responsibilities in this regard. See, e.g., Ohralik v. Ohio State Bar Assoc., 436 U.S. 447, 460 (1978). See also, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) recognizing the states' strong interest in maintaining a high degree of professionalism on the

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statutory scheme, be acting as "private parties" in "any 'anticompetitive' Board activities" (Pa8). The sanction of such a fishing expedition without evidence or sound legal theory and without even requiring as a threshold inquiry an examination of the regulations at issue to determine whether they would on their face violate the antitrust laws (cf. Fisher v. City of Berkeley, 475 U.S. 260 (1986)) can only result in a chilling effect on the States' choice of appropriately constituted professional boards and on the willingness of competent professionals to serve as Board members.

part of licensed pharmacists (Id. at 766) and recognizing further that the regulation of the health professions is not the same as "dealing with traders in commodities, but with vital interests of public health" where different standards of conduct are required for consumer protection (concurring opinion of Chief Justice Burger at pp. 773-775, quoting from Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 612 (1935)).

In the face of this Court's historical recognition of the seminal role of the states in regulating the professions, the Commission now boldly asserts authority under 15 U.S.C. § 45 to act as a "super-board" in all the states, treating these state agencies no differently from any other business entity-respondent, filing administrative complaints and

issuing final orders forever binding the Boards as Boards in their future regulatory and adjudicative activity.*

The complaints and final consent orders already a matter of public record in cases of FTC enforcement actions against professional boards well illustrate the unconstitutional dimensions of the exercise of such enforcement powers against the states. While these cases have been settled by consent, the terms of the consent orders are entirely consistent with the exercise of the Commis-

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* Concerns for FTC attempts to act as a "super-legislature" allowed to "roam at large" have been expressed by Professor Milton Handler in his article Antitrust Law Reform, 82 Col. L. Rev. 1287, 1326 (1982). In New Jersey's experience the FTC representatives clearly felt authorized to actually dictate the substantive content and language of the advertising regulations of the Boards.

sion's authority under 15 U.S.C. § 45, were it to be construed to extend to public entities. For example in The Matter of the Montana Board of Optometrists, FTC Docket No. C-3161, 50 Fed. Reg. 24203, the final consent order enjoins the Board from adopting, maintaining or enforcing "rules," "policies" or "any course of conduct" that would "prohibit" or "discourage" the advertising of price-related terms or claims of superiority in advertising ophthalmic goods and services (Id. at p. 24205). The order, in vague and overbroad terms, in effect permanently enjoins the Montana Board from promulgating and enforcing rules arguably within its mandate from the Montana Legislature. It actually ranges in scope all the way from dictating the kind of postage to be used for required notice to licensees to

requiring the repeal of current regulations. Id. at pp. 24205-24206.

To fully comprehend the dimensions of the intrusiveness of Commission orders purporting to enjoin both regulatory and adjudicative activities by the Board, one need only contrast them with the policies underlying Younger v. Harris, 401 U.S. 37 (1971). In Younger and later cases, it was held that principles of comity and federalism forbid enjoining pending state proceedings except in the rare case where such an action is necessary to avoid great and immediate irreparable injury. Indeed, this Court has recently extended the Younger abstention holding to forbid interference by federal courts in state administrative proceedings. See Ohio Civil Rights Comm'n v. Dayton Schools, 477 U.S. 619 (1986). Thus, the Commis-

sion is boldly asserting the authority to do what normally is forbidden even to the federal courts.

As this Court found in Middlesex Ethics Comm. v. Garden State Bar Assn., 457 U.S. 423 (1982) (reversing a decision not to abstain from consideration of a challenge to attorney disciplinary proceedings) the State has an important interest in assuring the professional conduct of licensed attorneys and there was no reason to assume that a competent State tribunal could not decide the First Amendment issue raised by the challenge. Id. at 434-435. Similarly, the enforcement activity undertaken by the Commission in contravention of important State interests with respect to other licensed professionals is not even necessary to protect the federal interest in antitrust

law enforcement, where adequate remedies to avoid unnecessarily anticompetitive regulation exist in state procedures for review of regulations and in the possibility of private parties' obtaining injunctive relief from the courts.

Most importantly, the Commission's asserted authority here to interfere with states' historical regulation of the professions by affirmatively intruding upon a state agency's legislative and adjudicative processes is clearly qualitatively different from the Congressional assertion of power to simply preempt (and thus render void) State legislation, or to require a State as employer to comply with the Fair Labor Standards Act as in the Garcia case. Nor can it be compared with a requirement that a State seek approval or certification of standards in

order to exercise an option to receive benefits from a federal funding program. See, e.g., King v. Smith, 392 U.S. 309, 333 (1968).

Indeed, even in the context of a federal funding program this Court has recognized limitations upon supersedure of state law. Thus, in Bowen v. American Hospital Assn., 476 U.S. 610 (1986) this Court, while holding that certain regulations of the Secretary of Health and Human Services (HHS), including regulations imposing obligations on state child protective agencies, were not authorized by federal law, found that such agencies might be required to document their compliance with federal law to receive federal funding but that they could not be required to act as "field offices of the HHS bureaucracy." Id. at p. ___.

Significantly, this Court further noted that to uphold the attempt by HHS to "give detailed marching orders to state agencies" would be to "countenance a novel and serious intrusion on state autonomy." Id. at p. ___, n. 26.

Similarly, what is at issue here is the unprecedented assertion of federal authority to try a State agency in an administrative tribunal for the "offense" of having promulgated regulations that may or may not be preempted by the federal antitrust laws, and to issue an administrative agency order subjecting the State agency to direct oversight by the Commission, thus usurping the State's authority in its future regulatory and adjudicative activities.

It is, therefore, evident that legislative sanction of this degree of

direct intervention by a federal agency into the legislative and adjudicative activities of a state agency would improperly cross over the line between the power granted to Congress under the Commerce Clause and the "reserved" powers of the States.

D. The Commission's Asserted Authority to Investigate the Activities of Petitioners for the Purpose of Determining Whether to Initiate An Enforcement Proceeding Was Plainly Spurious and the Subpoenas Issued to Petitioners Should Have Been Quashed.

The question of whether the Commission has the authority to subpoena witnesses in an investigation admittedly being conducted for the purpose of determining whether to file an administrative complaint against a state agency such as the Massachusetts Board is purely a ques-

tion of law, the resolution of which requires interpretation of the FTCA. In support of its decision in this matter, the Circuit Court quoted the following passage from Federal Trade Commission v. Swanson, 560 F.2d 1 (1st Cir. 1977):

> An agency's investigations should not be bogged down by premature challenges to its regulatory jurisdiction. These subpoenas do not fit within the narrow exception proscribing agency investigations that wander unconscionably far afield; the Commission's regulatory jurisdiction over appellants may be clouded but it is not plainly spurious. [Id. at 2.]

Amicus respectfully submits that this case fits squarely within the "narrow exception proscribing agency investigations that wander unconscionably far afield." For the reasons stated in the foregoing argument it is clear that the FTCA does not and, indeed, could not

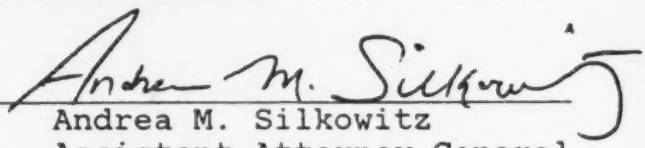
grant such unprecedented authority to the Commission. The assertion of this authority is, therefore, "plainly spurious" and the subpoenas should not have been enforced.

CONCLUSION

Amicus respectfully submits for the foregoing reasons that the petition for certiorari should be granted.

Respectfully submitted,

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